TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 160.

FRANK SHAW AND DAVID S. GREENOUGH, Jr., APPELLANTS,

vs.

THE LITTLE ROCK AND FORT SMITH RAILWAY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED AUGUST 4, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 160.

FRANK SHAW AND DAVID S. GREENOUGH, Jr., APPELLANTS,

vs.

THE LITTLE ROCK AND FORT SMITH RAILWAY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Bill	1	1
Summons	11	6
Demurrer Little Rock and Fort Smith Railroad	13	7
Decree	15	8
Appeal	15	8
Decree	16	9
Appeal	16	9
Demurrer Huntington et al	17	9
Transcript in cause No. 139	18	10
Bill	19	10
Exhibit	31	17
Demurrer	41	27
Petition	43	28
Exhibit	44	28
Replication	47	30
Motion	49	31
Decree in case No. 139	54	34
Affidavits Shattuck et al	62	38
Subscriptions to agreement	64	39
Master's report	68	41
Petition C. H. Richardson et al	70	41
Clerk's certificate	88	50

1 UNITED STATES OF AMERICA,
Eastern District of Arkansas :

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the twelfth day of April, anno Domini one thousand eight hundred and seventy-five, at the United States court room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

DAVID S. GREENOUGH, JR.,
vs.
THE LITTLE ROCK AND FORT SMITH RAILWAY
et al.

On July sixth, eighteen hundred and seventy-five, comes the complainant, by Brown and Ford, esquires, his solicitors, and files herein his bill of complaint, and, on motion of his solicitors, it is ordered that a writ of subpœna issue herein, returnable on the second day of August next, which is accordingly done.

Which bill is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Arkansas.

To the judges of the circuit court of the United States for the eastern district of Arkansas:

Frank Shaw and David S. Greenough, jr., citizens of Boston, in the the State of Massachusetts, brings this their bill of review against the Little Rock and Fort Smith Railway, a corporation organized under the laws of the State of Arkansas, and having its domicil in that State, Charles W. Huntingdon, Samuel H. Gookin, and Elisha Atkins, all citizens of the State of Massachusetts, and the Little Rock and Fort
2 Smith Railway Company, a corporation organized under the laws of the State of Arkansas, and thereupon complaining, your orators show unto your honors:

That on the first day of May, eighteen hundred and seventy-four, one Henry W. Paine and William B. Stevens, and defendant Charles W. Huntingdon, as trustees in the deed of mortgage therein exhibited, filed and exhibited in this honorable court their bill of complaint against the Little Rock and Fort Smith Railroad Company and divers other persons (who are not made defendants hereto, and whose names it is unnecessary to mention), by which bill of complaint they showed unto the court that the defendant the Little Rock and Fort Smith Railroad Company, by its deed of date of June twentieth, eighteen hundred and seventy, conveyed all the lands granted to it by Congress of the United States and the legislature of the State of Arkansas to Henry W. Paine, William B. Stevens, and Samuel T. Dana, in trust, to secure the payment of the principal and interest of five thousand bonds of one thousand dollars each issued by said railroad company, payable on the first day of April, A. D. nineteen hundred, with interest at the rate of seven per cent. per annum, payable semi-annually, a copy of which deed was exhibited with their said bill of complaint. That said bill further alleged that said railroad company had issued and sold said bonds, and that they were then outstanding against the company. That said trustee

Dana resigned his trusteeship thirteenth day of May, eighteen hundred and seventy-one, and that said Huntingdon was appointed in his stead; that it was provided by the mortgage that in case of default in payment of any coupon, the trustees might enter upon and sell the land, and that it was further provided that if default was made in payment of any half year's interest at the time and manner provided in the coupons, and the coupons having been presented and payment having been demanded, and such default shall continue for six months after such demand, the principal of all the bonds should, at the election of the trustees, become due and payable.

3 That the railroad company had made default in the payment of the coupons due April first, eighteen hundred and seventy-one; October first, eighteen hundred and seventy-one; April first, eighteen hundred and seventy-two; October first, eighteen hundred and seventy-two; April first, eighteen hundred and seventy-three; October first, eighteen hundred and seventy-*four;* and April first, eighteen hundred and seventy-four; that the complainants were not informed whether or not any of said coupons were presented for payment and payment duly demanded, but that they, the trustees, had elected that the principal of all the bonds issued under the said deed of mortgage shall become and be immediately due and payable; that said railroad company has completed one hundred miles of its road, and that lands for that length had been granted and patented to it by the United States Government. And by their said bill they prayed that said lands might be sold and for other relief. Your orator further shows that afterwards said Henry W. Paine and William B. Stevens resigned their trusteeship, and that defendants Gookin and Atkins were appointed in their stead, and that on their motion the bill was amended on July sixth, eighteen hundred and seventy-four, by substituting said Gookin and Atkins as complainants in the place of said Paine and Stevens. That said Little Rock and Fort Smith Railroad Company made no defense, and that on August third, eighteen hundred and seventy-four, the said bill was taken as confessed and decree to that effect entered; that on November sixth, eighteen hundred and seventy-four, it was decreed that said mortgage was executed and delivered to secure payment of five thousand bonds of one thousand dollars each issued by said company; that the whole amount of said bonds had been issued, and that the said bonds with the interest thereon were due and unpaid. And it was further decreed that unless the defendant the Little Rock and Fort Smith Railroad Company or some of them should pay or cause to be paid to the complain-
4 ants, on or before the tenth day of December, eighteen hundred
and seventy-four, the sum of five million dollars, and all due and unpaid interest, with the costs of suit, that said mortgage should be foreclosed, and that the whole of the lands granted as aforesaid to the said railroad company, whether patented or not, be sold in one lot, by a commissioner for that purpose in said decree appointed, on said tenth day of December, eighteen hundred and seventy-four, for cash in hand.

Your orators farther show that on the ninteenth day of December, eighteen hundred and seventy-four, the master appointed to make said sale reported to the court that he had sold the whole of the lands as granted and claimed, amounting in the aggregate to nine hundred and seventy-nine thousand acres, to George O. Shattuck, F. M. Weld, and George Ripley, for the sum of fifty thousand dollars; that on the same day said purchasers made and filed their affidavit that they had purchased the land grant and railroad "for and in the interests of the holders of the bonds issued by said railroad company and secured by

the mortgage on the said railroad and land grant, respectively"; and further, that in making such purchase they acted as agents expressly for certain bondholders, whose names were given, and among who were the defendants S. H. Gookin and Elisha Atkins, and said purchasers also appeared in open court, and stated that they had organized a new company, the defendant, The Little Rock and Fort Smith Railway, and desired said land grant conveyed to said Little Rock and Fort Smith Railway; and thereupon by the consent of the said Huntington, Gookin and Atkins, as trustees of the said land grant and mortgage, it was on the same day by the court decreed that said sale be in all things confirmed, and said land was decreed to be conveyed by the master to the Little Rock and Fort Smith Railway upon the stipulation that any holder of the bonds secured by the mortgage foreclosed by this suit, as well as of the bonds secured by the mortgage foreclosed by the
5 aforesaid suit numbered one hundred and thirty-eight, shall, upon
the transfer of his bonds and his right to any of the proceeds of the sales of the railroad and land grant under the aforesaid decrees in said suits numbered one hundred and one hundred and thirty-nine, within sixty days from the date of the organization of said corporation, unless further time be given by the court, be entitled to his proportional interest in the stock of said new corporation upon the same terms as any other holder of said bonds, but this shall not prevent such new corporation from requiring from any and all holders of said bonds the payment of his portion of the expenses of said sales and purchases, and of such other sums not exceeding five per cent. on the principal of said bonds as said corporation may deem fit for its interests to require as a condition upon which said stock shall, provided that the same requirement shall be made of all the other holders of said bonds, and provided further, that this stipulation shall not limit the power of said Shattuck, Weld, and Ripley to organize said corporation without notice, or of the corporation so organized to mortgage its property or to reserve for its own use an amount of its capital stock not exceeding ten per cent. thereof. And it was further decreed that said corporation, as a part of the consideration of the conveyance to it, should compromise or pay such claims against the Little Rock and Fort Smith Railroad Company as C. W. Huntington, George Ripley, and Henry A. Whitnay may, within a year from this date, approve, and upon such terms as they may prescribe.

Your orator farther shows that afterwards, on the sixth day of April, eighteen hundred and seventy-five, on the application of your orator and others, said decree was amended so as to provide that no such debts should be paid, except upon the order of the court to be obtained after notice given to your orator and other persons therein named.

Your orator further shows and states unto your honor that said cause one hundred and thirty-eight was, as appears of record in this
6 court, a proceeding in chancery in this court by which said Hunt-
ington and Gookin, as trustees of a certain other mortgage executed by the Little Rock and Fort Smith Railroad Company, conveying entirely different property to secure another and distinct issue of bonds, sought and obtained foreclosure of that mortgage and sale of the property therein conveyed. By that mortgage said company conveyed its road-bed, franchise, or rolling-stock, &c., to trustees to secure payment of three thousand five hundred bonds of said company of one thousand dollars each. This mortgage, both in the bonds secured and the property conveyed, was entirely distinct from the mortgage conveying the land grant. It was known as the first mortgage, while the other was known as the land-grant mortgage; and your orator avers, as indeed

appears of record, that the holders of the first mortgage bonds had, by virtue of such holding, no claim or demand upon any of the land grant, nor had any holder of the land grant mortgage bonds, by virtue of such holding, any right, claim, or demand against the property conveyed by the first mortgage.

On information and belief your orator further shows that upon fair sale in seperate parcels the six hundred and forty thousand acres of land, which before the filing of said bill had been patented to the said Little Rock and Fort Smith Railroad Company, was, at the time of said sale, worth from one million five hundred thousand to two millions of dollars, and that all of said lands were bound to their full value for payment of said land-grant mortgage bonds; and that the property conveyed by the first mortgage, subject as it was to a lien or claim in behalf of the State for one million dollars, besides perhaps one hundred and eighty thousand dollars to two hundred and forty thousand dollars interest accrued thereon, in its condition at the time of the sale, was not worth more at the outside than five hundred thousand dollars.

Your orator David S. Greenough further states at the time said bill was filed, and at the time said decree was rendered, he was, and still is, 7 the holder of sixty-four of said land-grant bonds of one thousand dollars each, and was, and is, interested in said sales and decrees, and he avers that had said land-grant mortgage been fairly and judiciously foreclosed his bonds were worth thirty to forty cents upon the dollar of the face value, or from three hundred to four hundred dollars per bond, being in the aggregate worth not less than twenty-five thousand six hundred dollars; and your orator Shaw says that he was at the same time, and still is, the holder of forty-eight of said bonds, which were worth at least nineteen thousand two hundred dollars, while, as the foreclosure and sale was managed by being mixed with matters with which as holders of land-mortgage bonds they had no concern, their bonds were, by said proceedings and by the confirmation of said sale, rendered of such small value as to be almost totally worthless, not being really worth more than five dollars a bond; that is to say, that but little, if any, more than the amount could be received by your orator on distribution of the bid, which, through the misconduct and totally unauthorized action of said trustees, was accepted by the master and confirmed by the court. Your orators exhibit herewith a perfect transcript of the record of said cause one hundred and thirty-nine, marked A, and make it a part of this bill.

And your orator avers and says that he is aggrieved by the said decrees, ordering and confirming said pretended sale, and that he ought not to be bound thereby, nor should any such decree have been made or pronounced, and that the said decree is erroneous and ought to be reversed, and that said pretended sale should not have been confirmed or ratified; and your orator, according to the course of this honorable court, assigns as error therein and in said proceedings—

First. That as appears by the bill of complaint itself the principal of the bonds secured by the land grant mortgage had not become due and payable according to the terms and conditions of said mortgage, 8 and that said trustees had no right, power, or authority to declare the principal of said bonds then due and payable as they pretended to do.

Second. That as appears by the said decree of November sixth, eighteen hundred and seventy-four, the court found the principal of the bonds, amounting to five millions of dollars, to be due and payable, and decreed that in default of payment *payment* thereof the said lands be sold, when, in fact, as was shown by the bill itself, the said principal was not due, and that the court erred in so finding and decreeing.

Third. That no account of the amount of unpaid interest which had accrued upon said bonds was taken, but that the decree was rendered generally for all interest due, as appears by the proceedings; and that the court erred in not causing such account to be taken.

Fourth. That, as appears by the decree of confirmation, the said decree was obtained by consent of the said trustees, Huntington, Gookin and Atkins, and that said trustees had no right, power or authority to give such consent, and that the court erred in accepting or allowing such consent, and in rendering a decree thereon.

That as appears by the affidavit filed by the purchasers Shattuck, Weld, and Ripley, two of the trustees, S. H. Gookin and Elisha Atkins, being at the time trustees for the bondholders for sale of said land, were interested as and were with other purchasers of said land, and that the court erred in confirming a sale from a trustee from himself.

Sixth. That a large list of lands scattered over a district of country one hundred miles in length and twelve in breadth, consisting of many different tracts and lying in different counties, were sold in one lot, and not in separate and distinct parcels, as by law they should have been.

Seventh. That the court erred in joining two distinct properties, conveyed by separate deeds, to secure different issues of bonds, and sold under separate decrees in one confirmation, or in what was in effect one confirmation.

9 Eighth. That the court erred in requiring the holders of the land-grant mortgage bonds to surrender their right to their security and accept a pro rata with the holders of the first-mortgage bonds in the two funds upon a penalty, in event of their refusing to do so, of being compelled to give up their bonds and security for the pittance bid therefor.

Ninth. That the court erred in confirming a sale of property for less than one-thirteenth of its value, because the purchasers offered to give the parties entitled thereto an interest in another fund with which they had nothing to do.

Tenth. That the court had no authority to allow anything but money to be received in payment for the property sold by its order, or to require the bondholders to accept anything but their share of the moneys received upon a fairly conducted sale of the pledged property, and the attempt to compel the acceptance of the stock in the company by the roundabout way of accepting a bid of less than one-thirteenth of the value of the property, and offering the bondholders the option of accepting either the stock offered or their pro rata of the inadequate bid accepted, is so inequitable that it needs but to be stated to ensure correction.

Eleventh. That as appears by the record a combination was formed among certain classes of bonds to buy the property at a nominal figure, and to thus compel others who were dissatisfied to accept such terms as they might impose, and that such scheme was carried out and effected by a fraudulent and illegal collusion between the purchasers and said trustees.

In consideration whereof, and for that there are divers other errors and imperfections in the said decree and proceedings, by reason whereof the said decrees ought to be reversed and reviewed and set aside, and an account taken of the amount due and payable on said bonds, and said lands resold in proper form.

10 To the end, therefore, that the said decrees and all proceedings

thereon may be reviewed and reversed, may it please your honors to grant that the parties above named, to wit, the Little Rock and Fort Smith Railway, Charles W. Huntington, Samuel H. Cookin, and Elisha Atkins, and the Little Rock and Fort Smith Railroad Company, be made and considered parties defendant to this bill. That they answer, &c., as fully, &c., and that said decrees be reviewed and reversed, or that your orator may be placed in the same situation that he would have been if such decrees had not been rendered, or that your orator may be otherwise relieved in all and singular the premises according to equity and good conscience.

That subpœnas issue, &c.

And as such, &c.

BROWN AND FORD,
For Complainants.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

B. C. Brown sworn, says he is of counsel for the complainants in the foregoing bill, who are absent from the State of Arkansas, and that he believes that the statements of said bill are true.

Subscribed and sworn to before me July 6, 1875.

We undertake for costs in the cause commenced by the foregoing bill, as usual.

BROWN AND FORD.

Filed and writ issued.
July 6, 1875.

RALPH L. GOODRICH, *Clerk.*

11 Which subpœna is as follows:

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the Little Rock and Fort Smith Railway Company, and the Little Rock and Fort Smith Railroad Company, greeting:

We command and strictly enjoin upon you that, laying all other matters aside, and notwithstanding any excuse, you and each of you be and personally appear before the judges of our circuit court in and for the eastern district of Arkansas, in chancery sitting, on the second day of August, A. D. 1875, it being the first Monday of August next, wheresoever the said court shall then be, and there to answer a bill of complaint, exhibited against you in our said court by David S. Greenough, jr., and to do further and receive what our said court shall have considered in that behalf. And this you are not to omit under penalty of what the law directs.

In testimony whereof, honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed this 6th day of July, A. D. 1875, and in the one hundredth year of our Independence.

Attest:
[L. S.] RALPH L. GOODRICH, *Clerk.*

12 N. B.—The defendants are required to enter their appearance
in the above cause, in the clerk's office of this court, on or before the 2nd day of August, eighteen hundred and seventy-five, or the bill will be taken pro confesso against them.

RALPH L. GOODRICH, *Clerk.*

I have served the within subpœna on the Little Rock and Fort Smith Railroad Company, by delivering a true copy of the same into the hands of Chisholm, for B. F. Danley, esq., president of said company, said Chisholm being a member of the family of said Danley over the age of sixteen years, at Palarm Station, in the eastern district of Arkansas, this thirty-first day of July, eighteen hundred and seventy-five.

JAMES TORRANS,
U. S. Marshal, E. D. Arkansas,
By C. M. BARNES, *Deputy.*

Returned and filed August 6th, 1875.

RALPH L. GOODRICH, *Clerk,*
By VAN CALDWELL, *D. C.*

On August fourth, eighteen hundred and seventy-five, as follows:

DAVID S. GREENOUGH, JR.,
vs.
LITTLE ROCK AND FORT SMITH RAILWAY ET AL.

And now comes the defendant, the Little Rock and Fort Smith Railway, by Clark and Williams, its solicitors, and enters its appearance in this cause, and asks and obtains time until the first Monday in September next to file its answer herein.

And on August twelfth, eighteen hundred and seventy-five, as follows:

13 DAVID S. GREENOUGH, JR.,
vs.
THE LITTLE ROCK AND FORT SMITH Railway et al.

And now comes the said defendant, the Little Rock and Fort Smith Railway, by Clark and Williams, its solicitors, and files its demurrer to the bill of complaint herein.

Which demurrer is in the words and figures following, to wit:

United States circuit court, eastern district of Arkansas. In chancery.

The demurrer of the Little Rock and Fort Smith Railway, one of the defendants to the bill of complaint of Frank Shaw and David S. Greenough, jr.

This defendant, by protestation, not confessing or acknowledging all or any of the matters, &c., to be true, &c., doth demur to said bill, and for cause of demurrer doth show that there are no errors in the record and premises and in the decrees of this court of the sixth day of November, eighteen hundred and seventy-four, and of the nineteenth day of December, eighteen hundred and seventy-four, in the said bill of review mentioned, to entitle the said complainants to reverse the said decree. Nor doth the said complainant allege or set up any new matter discovered or pretended to be discovered since the rendition of said decrees or either of them, as a basis or ground for the reversal or alteration of the said decrees; wherefore this defendant demurs to said bill as a bill of review, and doth further demur to the same as a bill to impeach the said decree or decrees for fraud, because no facts or circumstances constituting fraud in law or equity are alleged in said bill as a ground for impeaching or setting aside the same; wherefore she 14 prays judgment whether she ought to be compelled to put in any further or other answer, and humbly prays to be hence discharged with her reasonable costs.

SOL. F. CLARK,
Attorney for Defendant.

UNITED STATES,
Eastern District of Arkansas :

I, Sol. F. Clark, being duly sworn, do depose and say that I am the attorney of the defendant, the Little Rock and Fort Smith Railway, which is a corporation existing under the laws of the State of Arkansas, and that the above demurrer is not interposed for delay.

SOL. F. CLARK.

Sworn to and subscribed before me this twelfth day of August, eighteen hundred and seventy-five.

RALPH L. GOODRICH, *Clerk*,
By VAN CALDWELL, *D. C.*

We, Clark and Williams, attorneys and counsellors at law, at Little Rock, Arkansas, do hereby certify that, in our opinion, the above demurrer is well founded in point of law.

CLARK AND WILLIAMS.

Filed August 12th, 1875.

RALPH L. GOODRICH, *Clerk*,
By VAN CALDWELL, *D. C.*

UNITED STATES OF AMERICA,
Eastern District of Arkansas :

Be it remembered that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and 15 holden on Monday, the twenty-fifth day of October, anno Domini one thousand eight hundred and seventy-five, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November twelfth, eighteen hundred and seventy-five:

DAVID S. GREENOUGH, JR.,
vs.
THE LITTLE ROCK AND FORT SMITH RAILWAY et al.

And now, on this day, come the complainants, by Brown and Ford, esq's, their solicitors, and come the defendants, by Clark & Williams, esq's, their solicitors, and this cause came on to be heard upon the demurrer heretofore filed to the bill of complaint, and was argued by counsel.

Whereupon the court, being advised as to what judgment to be rendered thereon, doth sustain said demurrer, and the complainants electing to stand upon said demurrer, and not desiring to amend his said bill, it is ordered, adjudged, and decreed that the said bill be, and the same is hereby, dismissed, and thereupon the complainant filed herein their motion for an appeal of this case to the Supreme Court of the United States, which appeal is hereby granted.

And on December thirty-first, eighteen hundred and seventy-five, as follows:

In the United States circuit court for the eastern district of Arkansas.

DAVID S. GREENOUGH ET AL., PLAINTIFFS,
vs.
THE LITTLE ROCK AND FORT SMITH RAILWAY et al., defendants.

16 On this day comes Brown and Ford, solicitors for plaintiffs, and Clark and Williams, solicitors for defendants Charles W. Huntington, Samuel H. Gookin, and Elisha Atkins, and enter their appearance herein, and the case is continued with leave to them to plead, answer, or demur by the first day of the next term of this court.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun & holden on Monday, the 10th day of April, anno Domini one thousand eight hundred and seventy-six, at the United States court-room in the city of Little Rock, Arkansas, the honorable John F. Dillon, judge of the circuit court of the United States for the eighth judicial circuit, presiding, and honorable Henry C. Caldwell, district judge, and holding said court, the following proceedings were had, to wit, on May first, eighteen hundred and seventy-six:

DAVID S. GREENOUGH ET AL., COMPLAINANTS,
vs. Bill of review.
THE LITTLE ROCK AND FORT SMITH RAILWAY et als., defendants.

On this day come the parties herein, by their solicitors, and the dedefendants Charles W. Huntington and Samuel H. Gookin file their demurrer to the complainants' bill of complaint herein, and the complainants join in the demurrer; and the said demurrer, having been argued by counsel and submitted, is by the court sustained. And the complainants declining to amend their said bill of complaint and review, it is ordered, adjudged, and decreed by the court here that the same be and it is hereby finally dismissed at the costs of complainants. And thereupon the complainants pray an appeal to the Supreme Court of the United States, which is granted.

17 Which demurrer is in the words and figures following, to wit:

United States circuit court, eastern district of Arkansas. In chancery.

The demurrer of Charles W. Huntington and Samuel H. Gookin, trustees in the said railroad mortgage and defendants in the said bill of complaint of Frank Shaw and David S. Greenough, jr.

These defendants, by protestation, not confessing or acknowledging all or any of the matters to be true, &c., do demur to said bill, and for cause of demurrer do show that there are no errors in the record and premises and in the decrees of this court of the sixth day of November, eighteen hundred and seventy-four, and of the nineteenth day of December, eighteen hundred and seventy-four, in the said bill of review mentioned, to entitle the said plaintiffs to reverse the said decree. Nor doth the said complainant allege or set up any new matter discovered, or pretended to be discovered, since the rendition of said decrees, or either of them, as a basis or ground for the reversal or alteration of the said decrees; wherefore this defendant demurs to said bill of review, and doth further demur to the same as a bill to impeach the said decree or decrees for fraud, because no facts or circumstances constituting fraud in law or equity are alleged in said bill as a ground for impeaching or setting aside the same; wherefore she prays judgment whether they ought to be compelled to put in any further or other answer, and humbly prays to be hence discharged with her reasonable costs.

SOL. F. CLARK,
Attorney for Trustees.

UNITED STATES,
Eastern District of Arkansas:

18 I, Charles W. Huntington, being duly sworn, do depose and say that the above demurrer is not interposed for delay.

C. W. HUNTINGTON, *Trustee.*

Subscribed and sworn to before me this twenty-first of April, eighteen hundred and seventy-six.

RALPH L. GOODRICH, *Clerk.*

We, Clark and Williams, attorneys and counsellors at law at Little Rock, Arkansas, do hereby certify that in our opinion the above demurrer is well founded in point of law.

CLARK AND WILLIAMS.

Filed May first, eighteen hundred and seventy-six.

RALPH L. GOODRICH, *Clerk.*

The transcript of the cause number one hundred and thirty-nine, referred to in the bill of review as an exhibit thereto, is in the words and figures following, to wit:

Before the clerk in vacation, May twelfth, eighteen hundred and seventy-four.

HENRY W. PAINE ET AL.
vs.
LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

Come the complainants, by Clark and Williams, esq's, their solicitors, and file herein their bill of complaint and exhibit thereto; and on motion of said solicitors it is ordered that a writ of subpœna issue herein, returnable on the first Monday in July next, which is accordingly done.

19 Which bill is in the words and figures following, to wit:

To the judges of the circuit court of the United States for the eastern district of Arkansas:

Henry W. Paine, of Cambridge, William B. Stevens and Charles W. Huntington, both of Boston, all of the State of Massachusetts, and citizens of said State, as they are trustees under the deed of mortgage hereinafter mentioned, bring this their bill against the Little Rock and Fort Smith Railroad Company, a corporation created by and existing under the laws of the State of Arkansas, and a citizen of said State of Arkansas, Thomas C. Peek, J. D. Plose, John H. Haney, John J. Clendennin, Robert C. Bruce, and Harvey Lewis, surviving partners of the late firm of Bruce Brothers and Company, Augustus H. Garland and Lucius B. Nash, former copartners under the firm name of Garland and Nash, Augustus H. Garland, Henry Kyles, Uriah M. Rose, Wilson B. Gibson and Benton J. Brown, all of Little Rock, in the State of Arkansas, and citizens of said State of Arkansas, John G. Steacy, now commorant at said Little Rock, and John P. Garston, of   , Nova Scotia, as they are surviving partners of the late firm of Pierce, Steacy and Garston, Cornelias Hurley, of   , in the State of   , and a citizen of said State of   , Andrew B. Battelle and John G. Battelle, both of Memphis, in the State of Tennessee, and citizens of said State of Tennessee, copartners doing business under the firm name of Battelle and Company, the Saint Louis Railway Supplies Manufacturing Company, a corporation existing under the laws of the State of Missouri, and a citizen of said State of Missouri.

And thereupon your orators complain and say:

20 First. That the said The Little Rock and Fort Smith Railroad Company, at the time of the execution of the mortgage deed hereinafter mentioned, was, and now is, a corporation duly created by and existing under the laws of the State of Arkansas, for the purpose of constructing, operating, and maintaining a railroad from Little Rock by way of Van Buren, to Fort Smith, in the said State, and with authority to make, execute and deliver the mortgage deed and the bonds thereby secured, hereinafter more specifically set forth; that on the twentieth day of June, in the year eighteen hundred and seventy, Charles G. Scott, the then president, and Gorden N. Peay, the then secretary of the said The Little Rock and Fort Smith Railroad Company, being thereunto duly and legally authorized by a vote of the stockholders of said company, at a meeting of said stockholders held in conformity with the provisions of the law incorporating said company, executed and delivered in the name and behalf of and under the corporate seal of said company, to Henry W. Paine, Samuel T. Dana, and William B. Stevens, all of the State of Massachusetts, and citizens of said State, as trustees, a certain deed of mortgage bearing date the said twentieth day of June, by which said deed of mortgage the Little Rock and Fort Smith Railroad Company granted, bargained, sold, conveyed and transferred unto the said Henry W. Paine, Samuel T. Dana, and William B. Stevens, as joint tenants and not as tenants in common, and the survivor of them and their successors and assigns, all the right, title, interest, claim or demand whatever which the said railroad company then had, or which it should or might at any time thereafter acquire or become entitled to, of, in or to all those lands or sections of lands granted to said company by the acts of the Congress of the United States and by the general assembly of the State of Arkansas, for the purpose of aiding in the construction of a railroad from the city of Little Rock to the city of Fort Smith, as aforesaid, being ten
21 sections or six thousand four hundred acres for each mile, amounting, in the aggregate, to nine hundred and seventy-nine thousand two hundred acres of land, more or less, and situated in said States of Arkansas, adjoining and adjacent to the line of railroad of the said company, as in said acts of Congress provided; also all the right, title,

interest, claim or demand whatsoever which the said company then had, or which it should or might at any time thereafter acquire or become entitled to, of, in or to any and all such other lands as theretofore had been, or thereafter might be, granted or conveyed to said company in payment for subscriptions to its capital stock or otherwise, together with all and singular the endowments, income and advantages, tenements, hereditaments and appurtenances to the above-mentioned lands belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said company, of, in and to the same, and every part and parcel thereof, with the appurtenances, subject to the provisions of the aforesaid acts of Congress, excepting and reserving, however, all the lands which theretofore had been, or thereafter might be, included within the railroad and telegraph line of said company, or used for the construction or operation thereof, or for the tracks, yards, depot buildings and grounds.

To have and to hold the above described premises, property, lands and appurtenances, and except as hereinbefore reserved, unto the said Henry W. Paine, Samuel T. Dana, and William B. Stevens, as joint tenants and not as tenants in common, and to the survivor of the and their successors and assigns, to their only proper use and behoof, and of the survivor of them, and their successors and assigns, in trust, nevertheless, for the uses and purposes in said deed of mortgage expressed, all of which will more fully and at large appear by reference to said original deed of mortgage to be in court produced, and to a copy
22 thereof hereto annexed marked Exhibit A, which your orator prays
may be taken to be and considered as a part of this his bill of complaint; and your orators aver that said deed of mortgage was duly stamped as required by the internal revenue laws of the United States, and recorded in the several counties of the State of Arkansas, where said lands were situated, as required by the laws of said State.

Second. And your orators, further complaining, say that the said The Little Rock and Fort Smith Railroad Company executed and delivered the aforesaid deed of mortgage to the said Henry W. Paine, Samuel T. Dana, and William B. Stevens, trustees, in order the more effectually to secure the payment of the principal and interest of five thousand bonds of said railroad company, and which said railroad company had resolved to issue and negotiate, each of said bonds being of the denomination of one thousand dollars, and amounting in the aggregate to five million dollars, payable on the first day of April, in the year nineteen hundred, at the city of New York, in lawful money of the United States, with interest thereon at the rate of seven per centum per annum, payable semi-annually in lawful money of the United States, free from any United States government tax, at said city of New York or Boston, at the option of the holders, on the first day of October and April in each year, upon presentation and surrender of the coupons or interest warrants attached to said bonds, as they severally might become due and payable, the first of said coupons or interest warrants being due and payable on the first day of October, in the year eighteen hundred and seventy, all of which will more fully and at large appear by reference to a copy of said bonds set forth in the deed of mortgage above mentioned, a copy whereof is hereto annexed marked Exhibit A, and which your orators pray may be taken to be and considered as a part of this their bill of complaint.

And your orators are informed and believe, and therefore aver, 23 that the said The Little Rock and Fort Smith Railroad Company, after the execution and delivery of the aforesaid deed of mortgage to the said Henry W. Paine, Samuel T. Dana, and William B. Stevens, trustees, and after said deed of mortgage had been duly stamped and recorded as required by the laws of the United States and of the State of Arkansas, did from time to time issue the entire amount of bonds described in the aforesaid deed of mortgage, and that the aforesaid five thousand bonds, amounting in the aggregate, without interest, to the sum of five million dollars, remain outstanding against said railroad company.

Third. And your orators, further complaining, say that in and by article tenth of said deed of mortgage, it was mutually agreed that in case at any time thereafter any of the said trustees should die, or resign his said trust, a successor or successors of such trustee or trustees should be appointed by the surviving or continuing trustees or trustee, with the consent of said railroad company, and that the trustee or trustees so appointed, with the trustees or trustee surviving or continuing, should thereupon become invested with all and singular the powers, authorities and estates granted to or conferred upon said original trustee, and all the rights and interests requisite to enable him or them to execute the purposes of said trustees, without any further assurance or conveyance.

And your orators aver that pursuant to the provisions of the aforesaid deed of mortgage, the said Samuel T. Dana did, on the thirteenth day of May, in the year eighteen hundred and seventy-one, notify your orators, the said Paine and Stevens, and the said railroad company, in writing that he resigned his aforesaid trusts under said deed of mortgage, and that your orators, the said Paine and Stevens, with the consent of said railroad company, thereafter nominated and appointed the said Charles W. Huntington to be the successor of said Dana in
24 the trusts created by the aforesaid deed of mortgage, and said Huntington accepted said trust.

Fourth. And your orators, further complaining, say that in and by article seventh of said deed of mortgage it was among other things provided, that in case default should be made in the payment of any interest on any of the bonds issued under said deed of mortgage, and such default should continue for the period of six months, it should be lawful for the said trustees, or the survivors or survivor of them, or their successors, personally, or by his or their attorney or attorneys, agent or agents, to enter into and upon all and singular the lands, property and premises conveyed by said deed of mortgage, or intended so to be, and each and every part thereof, and exclude the said company and its agents wholly therefrom, and after entry, and without entry, personally or by his or their attorney or attorneys, agent or agents, to sell and dispose of all and singular the lands, property and premises conveyed by said deed of mortgage or intended so to be, or only so much and such parts thereof as they shall deem necessary or proper, with a due regard to the interests of all parties, by public auction, in the city of Little Rock, in the county of Pulaski, and State of Arkansas, or at such other place or places within said State as said trustees or the survivors or survivor of them might designate, and at such times as they or he might appoint, after having first given the notices of the time and place of such sale as prescribed in article seventh; and that such sale made pursuant to the terms of said article should be a perpetual bar, both in law and in equity, against the said The Little Rock and Fort Smith Railroad Company, its successors and assigns, and all other persons claiming or to claim the said premises or any part thereof, by, from, through or under the said railroad company, its successors or assigns.

And in and by article eighth of said deed of mortgage it was 25 also provided, that in case default should be made in the payment of any half year's interest on any of the aforesaid bonds at the time and in the manner in the coupon issued therewith provided, the said coupon having been presented, and payment of the interest specified having been demanded, and such default should continue for the period of six months after the coupon should have become due and been demanded as aforesaid, that then and thereupon the principal of all and singular the bonds secured by said deed of mortgage should at the election of said trustees become and be immediately due and payable, anything contained in said bonds or said deed of mortgage to the contrary notwithstanding; all of which will more fully and at large appear by reference to the aforesaid original deed of mortgage to be in court produced, and to the copy thereof hereto annexed marked "Exhibit A," which your orators pray may be taken to be, and considered as a part of this his bill of complaint.

Fifth. And your orators, further complaining, say that the said The Little Rock and Fort Smith Railroad Company has made default and failed to pay the following coupons or interest warrants attached to the bonds, issued under said deed of mortgage, as the same became due and payable, viz:

The coupons due and payable April 1, 1871.
The coupons due and payable October 1, 1871.
The coupons due and payable April 1, 1872.
The coupons due and payable October 1, 1872.
The coupons due and payable April 1, 1873.
The coupons due and payable October 1, 1873.
The coupons due and payable April 1, 1874.

And the aforesaid coupons still remain unpaid, and your orators are not informed whether or not any of said coupons were presented for payment, and payment duly demanded, but they aver that if 26 they were not *not* presented for payment, it was because the several holders thereof well knew that payment thereof would be refused, the said company having in the month of January, eighteen hundred and seventy-one, failed to pay the interest due and payable January first, eighteen hundred and seventy-one, on certain bonds issued under a deed of mortgage upon the railroad and equipments of said company. That the entire line of the railroad of the said The Little Rock and Fort Smith Railroad Company extends from the city of Little Rock to the city of Fort Smith, a distance of about one hundred and sixty miles. That the said railroad has thus far been only constructed from Argenta, a point upon the south side of the Arkansas River opposite to the city of Little Rock, to the town of Clarksville, in said State, a distance of about one hundred miles, and patents have been issued by the Secretary of the Interior for the said ten sections of land to the State of Arkansas for each mile of said road. That said railroad company has become, now is and for a long time has been notoriously and hopelessly insolvent; and your orators, by virtue of the power and authority conferred upon them by the aforesaid deed of mortgage, and more particularly by article eighth thereof, have elected that the principal of all the bonds issued under said deed of mortgage shall become and be immediately due and payable.

Sixth. And your orators, further complaining, say that they are informed and believe that the said defendant, Thomas C. Peek, on the thirteenth day of June, eighteen hundred and seventy, recovered judgment against the said The Little Rock and Fort Smith Railroad Company in the circuit court for the county of Pulaski and State of Arkansas for the sum of five hundred dollars; that the defendant J. D. Plose, on the twenty-third day of December, eighteen hundred and seventy-one, recovered judgment against said company in said court for the 27 sum of one hundred and fifty dollars; that the defendant John H. Haney, on the sixth day of January, eighteen hundred and seventy-two, recovered judgment against said company in said court for the sum of nine thousand five hundred ninety-two dollars and forty-two cents, and on the twenty-third day of June, eighteen hundred and seventy-three, recovered another judgment against said company in said court for the sum of twelve thousand eight hundred twenty-two dollars and fifty cents, and on the sixth day of November, eighteen hundred and seventy-three, recovered another judgment against said company in said court for the sum of two thousand seven hundred fifty-one dollars and twenty-one cents; that the defendant John J. Clendennin, on the sixth day of January, eighteen hundred and seventy-two, recovered judgment against said company in said court for the sum of one hundred and fifty dollars: that the defendant Cornelius Hurley, on the ninth day of January, eighteen hundred and seventy-two, recovered judgment in said court against said company for the sum of seven thousand nine hundred eighty-one dollars and five cents; that the said defendant' Robert C. Bruce and Harvey Lewis, surviving partners of the late firm of Bruce Brothers and Company, on the first day of December, eighteen hundred and seventy-three, recovered judgment in said circuit court against said company for the sum of five hundred fifty five dollars and ninety cents; that the defendants Augustus H. Garland and Lucius B. Nash, late copartners under the firm-name of Garland and Nash, on the thirteenth day of November, eighteen hundred and seventy-three, recovered judgment in said court against said company for the sum of twelve hundred dollars; that the defendant Augustus H. Garland, on the thirteenth day of November, eighteen hundred and seventy-three, recovered judgment in said court against said company for the sum of three thousand nine hundred fourteen dollars and eighty-eight cents; that the defendant Henry Kyles, on the 28 thirteenth day of November, eighteen hundred and seventy-three, recovered judgment in said circuit court against said company for the sum of three hundred and fifty dollars; that the said defendant Uriah M. Rose, on the eleventh day of March, eighteen hundred and seventy-four, recovered judgment in said court against said company for the sum of four thousand seven hundred and fifty dollars; that the defendants John G. Steacy and John P. Garston, surviving partners of the late firm of Pierce, Steacy and Garston, on the nineteenth day of March, eighteen hundred and seventy-four, recovered judgment in said court for the sum of five thousand five hundred and ten dollars; that the defendant, W. B. Gibson, on the third day of March, eighteen hundred and seventy-four, recovered judgment in said court against said company, for the sum of two thousand one hundred and twenty-two dollars and thirty-five cents; that the defendant, Benton J. Brown, on the eighteenth day of March, eighteen hundred and seventy-four, recovered judgment in said court against said company for the sum of five hundred fifty-three dollars and fifty cents; that the defendants, Andrew B. Battelle and John G. Battelle, doing business as copartners under the firm-name of Battelle and Company, on the fourth day of December, eighteen hundred and seventy-three, recovered

judgment agaist said company in the circuit court of the United States for the eastern district of Arkansas, for the sum of one thousand two dollars and twenty-seven cents; and that the defendant, the Saint Louis Railway Supplies Manufacturing Company, on the fifth day of December, eighteen hundred and seventy-three, recovered judgment against said company in said United States circuit court for the sum of five thousand seven hundred seventy-six dollars and thirty-eight cents; all of which said judgments your orators are informed and believe still remain unsatisfied in whole or in part, and are still in full force and effect against said railroad company; and your orators are advised that under the laws of the State of Arkansas the aforesaid
29 judgments are a lien upon the lands and property of said company, subject, however, to the lien created by the aforesaid mortgage executed to the said Henry W. Paine, Samuel T. Dana, and William B. Stevens, trustees, by the aforesaid railroad company, as hereinbefore set forth.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, your orator hereby waiving the necessity of the answer of said defendants, or any of them, being put in under the oaths of said defendants, or the oath of any of them, and may, according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, distinct and perfect answer make to all and singular the matters aforesaid, paragraph by paragraph, and that as fully and particularly as if the same were here repeated and they and every of them distinctly interrogated thereto, and that the lands granted to the said The Little Rock and Fort Smith Railroad Company, by the acts of Congress and of the general assembly of the State of Arkansas, mentioned and described in the aforesaid deed of mortgage, being ten sections of land for each mile of said railroad, may, so far as the said company is entitled to the same, be sold and all the right, title and interest of said company therein, and that the proceeds of such sales may be paid into this honorable court to await the order and direction of said court, and that all persons claiming under the said The Little Rock and Fort Smith Railroad Company, and all other persons claiming by, through or under said company, may be absolutely barred and foreclosed of and from all equity of redemption in and to the same and every part thereof forever, and for such other and further relief as to your honors may seem meet in the premises:

May it please your honors to grant unto your orators a writ of subpœna to be directed to the said The Little Rock and Fort Smith
30 Railroad Company, the said Thomas C. Peek, John H. Haney, John J. Clendennin, Cornelias Hurley, Robert C. Bruce and Harvey Lewis, as they are surviving partners of the late firm of Bruce Brothers and Company, Augustus H. Garland and Lucius B. Nash, late copartners under the firm name of Garland and Nash, Augustus H. Garland, Henry Kyles, Uriah M. Rose, John G. Steacy and John P. Garston, surviving partners of the late firm of Pierce, Steacy and Garston, Wilson B. Gibson, Benton J. Brown, Andrew B. Battelle and John G. Battelle, copartners under the firm name of Battelle and Company, and the Saint Louis Railway Supplies Manufacturing Company, commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, and perfect answers make to all and singular the premises, and further to stand to, perform and abide such

further order, direction and decree therein as to this honorable court shall seem meet.

CHARLES W. HUNTINGTON,
Trustee, and as Attorney for Henry W. Paine and Wm. B. Stevens, Trustees.
CLARK AND WILLIAMS, AND
T. D W. YONLEY,
Sols. for Plaintiffs.

We, Clarke and Williams, acknowledge ourselves security for all costs for which the plaintiffs may be liable in this suit.

CLARK AND WILLIAMS.

Filed and writs issued, May 26, 1874.

RALPH L. GOODRICH, *Clerk.*

Which exhibit is in the words and figures following, to wit:

31 EXHIBIT A.

This indenture, made the twentieth day of June, in the year of our Lord eighteen hundred and seventy, between the Little Rock and Fort Smith Railroad Company, a corporation existing under the laws of the State of Arkansas, of the first part, and Henry W. Paine, Samuel T. Dana and William B. Stevens, all of the State of Massachusetts, of the second part:

Whereas, under and by virtue of an act of the Congress of the United States of America, approved July 28, 1866, entitled "An act to revive and extend the provisions of 'An act granting the right of way and making a grant of land to the States of Arkansas and Missouri, to aid in the construction of a railroad from a point upon the Mississippi opposite the mouth of the Ohio River, via Little Rock, to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi River,' approved February 9, 1853, and for other purposes," the said Congress of the United States granted to the said State of Arkansas, for the purpose of aiding in the construction of the railroad of the Little Rock and Fort Smith Railroad Company, from the city of Little Rock to the city of Fort Smith near the western boundary line of said State, every alternate section of public land of the United States, not mineral, to the amount of ten alternate sections per mile for each mile of said railroad; and further, the said company, in addition to the land so granted, was authorized to locate the said railroad on any public lands of the United States not otherwise appropriated. reserved, or disposed of, and the right of way over said lands of the United States for the purposes aforesaid, was thereby granted to said company to the width of one hundred feet on each side of said road, as located;

And whereas, under and by virtue of an act of the general assembly of said State of Arkansas, approved April 12, 1869, entitled "An act supplemental to an act to incorporate the Little Rock and Fort Smith Railroad Company, approved January 22, 1855, and an act entitled 'An act fixing the line of the Little Rock and Fort Smith branch of the Cairo and Fulton Railroad,' and granting the lands donated by Congress to the State in aid thereof, approved January 19, 1855," all the rights of way, benefits, privileges, lands and property granted to said State of Arkansas, by virtue of said act of Congress and any acts amendatory thereof, for the purpose of aiding in the construction of said Little Rock and Fort Smith Railroad, were by said general assembly granted, vested in, and transferred to said Little Rock and Fort Smith Railroad Company;

And whereas the Congress of the United States, by an act appoved April 10, 1869, entitled "An act to extend the time for the Little Rock and Fort Smith Railroad Company to complete the first section of twenty miles of said road," and also by an act approved March 8, 1870, entitled "An act to amend an act entitled 'An act to extend the time for the Little Rock and Fort Smith Railroad Company to complete the first section of twenty miles of said road,' approved April ten, eighteen hundred and sixty-nine," fixed and established the time for building the first section of twenty miles of said railroad for the term of three years from the thirteenth day of May, eighteen hundred and sixty-seven; with the terms and conditions of which said last named acts said company has fully complied;

And whereas, in pursuance of the powers and authorities in it duly vested, the said party of the first part hath resolved to issue and negotiate a series of five thousand bonds, each of one thousand dollars, numbered respectively from one to five thousand inclusive, and to amount in the aggregate to five million dollars; which said bonds are to be all equally secured by these presents, and are to be of like tenor, and in the form following, viz:

32 UNITED STATES OF AMERICA, STATE OF ARKANSAS.

THE LITTLE ROCK AND FORT SMITH RAILROAD COMPANY.

No. .] *First-mortgage sinking-fund land-grant bond.* [$1,000.

The Little Rock and Fort Smith Railroad Company, a corporation existing under the laws of the State of Arkansas, acknowledges itself to owe to bearer one thousand dollars lawful money of the United States, which sum the said company promises to pay to the bearer hereof on the first day of April, in the year one thousand nine hundred, at the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually, free from any United States Government tax, at said city of New York, or Boston, at the option of the holder, on the first day of October and April in each year, upon presentation and surrender of the coupons hereto annexed, as they severally become payable; and in case of the non-payment of any half-yearly instalment of interest, which shall have become payable and shall have been demanded, and the continuance of such default for the period of six months after any such demand, the principal of this bond shall become due in the manner and with the effect provided in the deed of trust or mortgage hereinafter mentioned.

This bond is one of a series of five thousand bonds of like tenor and date, numbered consecutively from one to five thousand inclusive, the payment of each and all of which is equally secured by a first mortgage, or deed of trust, bearing date the twentieth day of June, eighteen hundred and seventy, executed and delivered by the said railroad company to Henry W. Paine, Samuel T. Dana and William B. Stevens, trustees, conveying all the right, title and interest which the said company now has, or shall hereafter acquire, in and to all the lands of the United States to said company granted by an act of Congress approved July 28, 1866, and the several acts amendatory thereof, and by an act of the general assemby of the State of Arkansas, approved April 12, 1869, and also in and to all such other lands as heretofore have been, or hereafter may be, granted or conveyed to said company, except the lands which are or shall be included in the railroad and telegraph line of said company, or used for the construction or operation thereof, or for the track, yards, depot grounds, buildings or erections thereof. The lands included in the aforesaid mortgage, or deed of trust, amount in the aggregate to one million acres, more or less.

This bond is secured and redeemable by a sinking fund in the manner provided and declared in said deed of trust, and shall be received at its par value in payment for any of the lands which may be sold or conveyed under the provisions of said mortgage or deed of trust.

This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed hereon and signed by the trustees named above, or the survivor of them, or their successors as such trustees.

In witness whereof, the said company has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president and treasurer, and has also caused the coupons hereto annexed to be signed by its treasurer, this twentieth day of June, in the year eighteen hundred and seventy.

President.

Treasurer.

33 Now, therefore, this indenture witnesseth: That for and in consideration of the premises, and of the sum of one dollar to it duly paid by the parties of the second part, and in order to secure the payment of the principal and interest of the said bonds, according to the tenor thereof, and of the coupons thereto annexed, the said party of the first part hereto has granted, bargained and sold, and by these presents does grant, bargain, sell, convey, and transfer unto the said parties of the second part, as joint tenants, and not as tenants in common, and the survivor of them and their successors and assigns, all the right, title, interest, claim, or demand whatever, which the party of the first part now has, or which it shall or may at any time hereafter acquire or become entitled to, of, in, or to all those lands or sections of land so as aforesaid granted in and by said acts of Congress of the United States of America, and in and by said act of the general assembly of the State of Arkansas, and each and every of them, for the purpose of aiding in the construction of a railroad from the city of Little Rock to the city of Fort Smith, as aforesaid, being ten sections, or six thousand four hundred acres for each mile, amounting in the aggregate to nine hundred and seventy-nine thousand two hundred acres of land, be the same more or less, and situated in said State of Arkansas, adjoining and adjacent to the line of railroad of the said party of the first part as hereinbefore described, and in said acts of Congress provided; full lists of which said lands will be appended to this instrument, as said lands are surveyed, selected and certified, which said lists are to be signed by the president of said company, and are to be taken and considered as part and parcel of this deed, without reference to the dates of said lists; also all the right, title, interest, claim, or demand whatsoever which the said party of the first part now has, or which it shall or may at any time hereafter acquire or become entitled to, of, in, or to any and all such other lands as heretofore have been, or hereafter may be, granted or conveyed to said company in payment for subscriptions to its capital stock, or otherwise; together with all and singular the endowments, income, and advantages, tenements, hereditaments, and appurtenances to the above-mentioned

lands belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, incomes, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, present or prospective, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances, subject, nevertheless, to the provisions of the acts of Congress of the United States as aforesaid; excepting and reserving, however, all the lands which heretofore have been, or hereafter shall be, included within the railroad and telegraph line of said company, or used for the construction or operation thereof, or for the track, yards, depot grounds, buildings, or erections thereof:

To have and to hold the above described premises, property, lands, and appurtenances, and except as hereinbefore reserved, unto the said parties of the second part as joint tenants, and not as tenants in common, and to the survivor of them and their successors and assigns, to the only proper use, benefit, and behoof of the said parties of the second part, and the survivor of them, and their successors and assigns, in trust, nevertheless, for the uses and purposes herein expressed, to wit:

Article first. Until default shall be made by the said party of the first part, its successors or assigns, in the payment of the principal or interest, or some part thereof, of the said bonds, or of some one of them, or until default shall be made in the performance or observance of any other covenant of the party of the first part herein contained, the said party of the first part, its successors and assigns, shall be suffered and permitted to possess, manage, use, and enjoy the aforesaid lands and premises, in the same manner and with the same effect as if this mortgage had not been made, and except as hereinafter provided.

Article second. All moneys arising from the sales of the said lands, after deducting the expenses of executing this trust, are hereby pledged to the payment of the said bonds, and of the interest coupons, or warrants, thereto attached; and all such moneys shall be applied by
34 the trustees from time to time, as they shall receive the same;
first, to the payment, so far as the same may be necessary, of the coupons or interest warrants attached to said bonds, as fast as the same shall become due and payable; secondly, in purchasing and cancelling such outstanding bonds as can be obtained at their market value, not exceeding, however, a premium of ten per cent.; and thirdly, to the payment of such of the bonds themselves as shall not have been purchased in accordance with the foregoing provisions, when the same shall become due and payable.

Article third. The said lands thus granted, as aforesaid, and all other lands which have been or may be hereafter granted to the party of the first part, excepting that portion of any such lands occupied or used, or that may now or hereafter be occupied or used, for the roadway, depots, and other purposes incident and convenient to the proper working of said road, shall be carefully valued and appraised by the party of the first part, its officers or agents, in divisions and parcels, as may seem to them expedient or convenient for effecting a sale thereof, which allotments and valuations shall be made in writing, from time to time, as may be found convenient or practicable, and shall be subject to the approval of the trustees; and upon such approval, a duplicate thereof shall be deposited with each of the trustees, and also with the treasurer of the party of the first part, which said allotments and valuations may be varied and changed from time to time, by the party of the first part, as the value of the lands may be enhanced or depreciated, subject to the approval and deposit as aforesaid.

ARTICLE FOURTH. The party of the first part shall at all times be at liberty to contract for the sale of any parcel or parcels of said land at such approved prices, and upon such terms as to payment as shall be fair and reasonable, and such sale or sales may be for cash or on credit, or partly for cash and partly on credit; any of the bonds aforesaid shall be received at the par value thereof as cash, and the balance of such price may be secured by a mortgage on the parcel or parcels of land so sold. If such sale or sales shall be made for cash, then, upon the payment of such cash, or surrender of such bonds to the trustees, the said trustees, or any two of them, shall, by proper deeds or instruments executed by them, or by the duly authorized agent or attorney of the said trustees, grant and convey such parcel or parcels of land to the purchaser or purchasers thereof, to hold in fee-simple by full and sufficient deeds. If such sale or sales shall be made upon credit, in whole or in part, then the said trustees, or any two of them, shall and may, by proper deeds or instruments, executed by them or any two of them, or by the duly authorized agent or attorney of the said trustees, grant and convey such parcel or parcels of land to the purchaser or purchasers thereof, to hold in fee-simple, and shall receive from each purchaser or purchasers the cash paid, if any, and his or their note or notes, bond or bonds, for the part of such price then unpaid, together with and secured by his or their mortgage or mortgages upon such parcel or parcels of land, and shall hold the same, and all moneys received therefrom, upon the trusts herein mentioned. And in either case, and in case of any sale or sales of land made by said trustees, under the provisions hereof, the said deeds of the said trustees, or of any two of them, or of the duly authorized agent or attorney of the said trustees, shall be valid and effectual for the purpose of, and shall invest the purchaser or purchasers named therein with, a full, perfect and complete title to the premises therein described, free and clear of all incumbrances, on account of, or connected with, the issue of the bonds secured by this instrument, and shall include as well the title of the party of the first part hereto as of the trustees aforesaid; and provided, also, that the said trustees may in their discretion lease or otherwise grant from time to time the right to such party or parties, whether individual or corporate, as they may approve, of cutting timber, or of using any water-power, or mining coal or mineral ores of any kind, or of excavating slate, or of using any of the land or other property hereby granted, such lease or grant to be on such terms and for such time as said trustees may approve, the proceeds, nevertheless, to be applied to the purposes of the trust, in the manner herein specified.

35 ARTICLE FIFTH. The trustees shall have full power, from time to time, to employ such clerks and assistants as they shall find necessary to enable them to discharge properly the duties devolving upon them under the provisions of this instrument, in respect to the sale or conveyance of the land granted as aforesaid, or which may hereafter be acquired by the said party of the first part, and conveyed, or intended to be conveyed hereby; and they shall have power to appoint one or more agents or attorneys to act generally in their behalf in respect thereto, and from time to time remove such agent or agents, attorney or attorneys, and substitute or appoint others in the place or places of the agent or attorneys so removed; and all conveyances made and executed by either of such agents or attorneys, and all other acts performed by either, within the scope of the power delegated to or conferred upon him by said trustees, and within the scope of the power

herein granted to or conferred upon said trustees, shall be legal and valid to every intent and purpose as if executed, done, or performed by said trustees.

ARTICLE SIXTH. Conveyances of the said lands may be, from time to time, and at all times, made and executed by any two of the trustees, or, under the authority of the trustees, by an agent appointed by them, as provided in article fifth, and being so made and executed, shall be effectual to divest the title of all the trustees; but in respect to any conveyances made by any two of the trustees *or* the lands embraced therein, or the proceeds of sale thereof, the trustee not joining shall be in no manner answerable.

ARTICLE SEVENTH. In case default shall be made in the payment of any interest on any of the said bonds secured by this instrument, according to the tenor of the coupons thereto attached, or in the payment of any part of the principal of said bonds, or any of them, when the same shall become payable, or in case default shall be made in the performance or observance of any other covenant of the party of the first part herein contained, and if any such default shall continue for the period of six months, it shall be lawful for the said trustees, or the survivors or survivor of them, or their successors, personally, or by his or their attorney or attorneys, agent or agents, to enter into and upon all and singular the lands, property, and premises hereby conveyed, or intended so to be, and each and every part thereof, and exclude the party of the first part, and its agents, wholly therefrom, and after entry as aforesaid, or other entry, or without entry, personally, or by his or their attorney or attorneys, agent or agents, to sell and dispose of all and singular the lands, property, and premises hereby conveyed or intended so to be, or only so much and such parts thereof as they shall deem necessary or proper, with a due regard to the interests of all parties, by public auction in the city of Little Rock, in the county of Pulaski, and State of Arkansas, or at such other place or places within the State of Arkansas as the said trustees or the survivors or survivor of them, or their successors, shall designate, and at such times as he or they may appoint, having first given notice of the place or places and the times of such sale, by advertisement, published not less than three times a week for six weeks, in one or more newspapers published in the city of New York, also in Boston, Massachusetts, and also in one or more newspapers published in the State of Arkansas, and wherever else required by law, and to adjourn the said sale, from time to time, in their or his discretion; and, if so adjourning, to make the same without further notice at the time and place to which the same may be so finally adjourned, and to make and deliver to the purchaser or purchasers of the said premises good and sufficient deed or deeds in the law for the same in fee simple; which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said party of the first part, its successors and assigns, and all other persons claiming or to claim the said premises, or any part or parcel thereof, by, from, through or under the said party of the first part, its successors or assigns; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys and counsel fees and all other expenses, advances, or liabilities which may have been made or incurred by the said trustees in respect to the said lands and premises, or any part or parcel thereof, or in managing the business thereof while in their or his possession,
36 and in arranging for and completing the sale aforesaid, and all the payments which may have been made by him or them for taxes or assessments on the said premises, or any part thereof, as well

as compensation for his or their own services, to apply the said proceeds to the payment of the principal of such of the said bonds as may be at that time unpaid, whether or not the same shall have previously become due, and of the interest which shall at that time have accrued on the said principal, and be unpaid, without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest; and if, after payment of the same in full, a surplus shall remain, to pay over such surplus to the said company, or render the same as any court of competent jurisdiction shall order; it being expressly agreed and understood, that in no case shall any advantage be taken of any valuation, appraisement, or extension laws by the said party of the first part, nor of any injunction, or stay of proceedings, or any process to be applied for or obtained by it to prevent such entry and sale as aforesaid.

And it is hereby declared and agreed, that the receipt of the said trustees, or of such of them as shall make such sale, shall be a sufficient discharge to the purchaser or purchasers of the premises which shall be sold as aforesaid, for his or their purchase money, and that such purchaser or purchasers, his or their heirs, executors or administrators, shall not, after payment thereof, and having such receipt, be liable to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in any manner whatever answerable for any loss, misapplication or non-application of such purchase money, or of any part thereof, or be obliged to inquire into the necessity, expediency, or authority of or for any such sale.

ARTICLE EIGHTH. In case default shall be made in payment of any half year's interest on any of the said bonds, at the time and in the manner provided in the coupon issued therewith, the said coupon having been presented, and the payment of the interest specified having been demanded, and such default shall continue for the period of six months after the said coupon shall have been due, and been demanded, as aforesaid, then and thereupon, the principal of all the bonds secured hereby shall, at the election of the trustees, become and be immediately due and payable, anything contained in the said bonds or herein to the contrary notwithstanding.

ARTICLE NINTH. All the trust moneys which shall come to the hands of the trustees, until the same shall be applied or used in accordance with the provisions herein contained, shall be invested in United States securities, or deposited in the city of New York, or Boston, in such bank or trust company as said trustees may select, upon the best interest that said trustees may be able to procure for the same; or said moneys may be loaned from time to time upon such collateral securities as said trustees may approve. All interest derived from such investment, deposit, or loans, shall be applied by said trustees to the payment of the aforesaid bonds secured herein.

ARTICLE TENTH. It is mutually agreed by and between the parties hereto, that the word "trustees," as used in these presents, shall be construed to mean the trustees or trustee for the time being, whether original or substituted; and whenever a vacancy shall exist, to mean the surviving or continuing trustees or trustee, and such trustees or trustee shall, during such vacancy, be competent to exercise all the powers by these presents granted to, or conferred upon, the parties of the second part. And it is further mutually agreed by and between the parties hereto, and it is hereby declared to be a condition upon which the parties of the second part have assented to these presents, that neither of the said trustees shall be in any manner responsible for any act, default, or misconduct of any other of them, nor for any default or misconduct of any agents, depository, or persons employed by them in good faith, nor shall either of them be answerable except for his own wilful default or misconduct; that in all cases said trustees shall be authorized to pay such reasonable compensation, as they shall deem proper, to all the attorneys, servants and agents they may reasonably employ in the management of their trust; that the said trustees shall be 37 entitled to just compensation for all services which they, or either of them, may hereafter render in their trust, to be paid by the said company, or out of the income of the property, and for that purpose may at any time apply to the courts without notice to any person except the said party of the first part, its successors or assigns; that either of said trustees, or any successor, may resign or discharge himself of the trust created by these presents, by notice in writing to the said company, and to the existing trustee, if there be such, at least three months before such resignation shall take effect, or such shorter time as they may accept as adequate notice, and upon the due execution of the conveyances hereinafter required.

That in case, at any time hereafter, either of the said trustees, or any trustees or trustee hereafter appointed, shall die or resign, or become incapable or unfit to act in the said trust, a successor or successors to such trustee or trustees shall be appointed by the surviving or continuing trustee, with the consent of the said company; and the trustee or trustees so appointed, with the trustee surviving or continuing, shall thereupon become invested with all and singular the powers, authorities, and estates granted to, or conferred upon, the parties of the second part by these presents, and all the rights and interests requisite to enable them or him to execute the purpose of this trust, without any further assurance or conveyance, so far as such effect may be lawful; but the surviving or continuing trustee shall immediately execute all such conveyances and other instrument as may be fit or expedient for the purpose of assuring the legal estate in the premises jointly with himself to the trustee so appointed; and upon death, resignation, or removal by any court of competent jurisdiction, of any trustee, or an appointment in their or his place in pursuance of these presents, all their or his powers and authorities by virtue hereof shall cease; and all the estate, right, title, and interest in the said premises of any trustee so dying, or resigning, or being removed, shall, if there be a co-trustee surviving or continuing in office, wholly cease and determine; but the said trustee so resigning or being removed, shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance, to vest in such new trustee jointly with the continuing trustee, and upon the trusts herein expressed, all the lands, property, estates, rights and franchises which may be at that time held upon the said trusts; provided, nevertheless, and it is hereby declared and agreed, that in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint, in the manner hereinbefore provided, a successor in any vacancy which may have happened in said trust, application in behalf of all the holders of the bonds secured hereby may be made by the surviving or continuing trustee, or, if the trust be wholly vacant, by holders of the bonds secured hereby to the aggregate amount of one hundred thousand dollars, to any court of competent jurisdiction in the State of Arkansas, for the appointment of a new trustee or new trustees.

And the said party of the first part for itself, its successors, and assigns, in consideration of the premises, and of one dollar to it duly paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hereby covenants and agrees to and with the said parties of the second part, and the survivor of them, their successors and assigns, that except as hereinbefore reserved and excepted, the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the *the* trustees under this indenture, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the said parties of the second part, the survivor of them, and their successors in said trust, upon the trust herein expressed, the lands hereinbefore mentioned, and to which the said company is or may hereafter for any reason become entitled, or which the said company, its successors or assigns, may in any manner acquire, as by the said trustee, or their counsel learned in the law, shall be reasonably advised, devised, or required, except as hereinbefore reserved and excepted.

ARTICLE ELEVENTH. If the said party of the first part shall well and truly pay the sum of money herein required to be paid by it, and all interest thereon, at the times and in the manner herein specified,
and shall well and truly keep and perform all the covenants
38 and agreements herein required to be kept and performed by the
said party, according to the true intent and meaning of these presents, then and in that case the estate, right, title, and interest of the said parties of the second part, as trustees aforesaid, shall cease, determine, and become void; otherwise, the same shall be, continue, and remain, in full force and virtue.

In witness whereof, the said party of the first part has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its president and secretary, and the said parties of the second part have hereunto set their hands and seals to evidence their acceptance of the trust hereby created, the day and year first above written.

(Signed) C. G. SCOTT, *President.*
[SEAL.] GORDON N. PEAY, *Secretary.*

HENRY W. PAINE. [SEAL.]
SAMUEL T. DANA. [SEAL.]
WM. B. STEVENS. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. B. COWPLAND.
JAMES PENES.
C. W. HUNTINGTON, to H. W. P., S. T. D., & W. B. S.

STATE OF ARKANSAS,
County of Pulaski, ss:

This may certify that on this twentieth day of June, A. D. 1870, before me, George W. McDiamid, county clerk and clerk of the circuit court in and for said county, and by law duly authorized to take acknowledgments and proofs of deeds and other writings, and to administer oaths or affidavits to be used or recorded in said State of Arkansas, personally appeared Charles G. Scott, president of the Little Rock and Fort Smith Railroad Company, to me individually well known to be the person whose name appears upon and is subscribed to the within and foregoing deed, and, he being duly sworn, did depose and say that he was president of said company at the date of the execution of the foregoing instrument, and still is such president, and that the said instrument was executed by and under a resolution of the stockholders, as well as of the directors of said company, and that the said indenture was executed and delivered by the said company as aforesaid, acting through him as such president thereof, by virtue of the said 39 resolutions, as the free act and deed of said company, and for the consideration, uses, and purposes therein mentioned and set forth. And at the same time personally appeared Gordon N. Peay, to me individually well known to be the person he purports to be in and upon said deed, as one of the signers thereof, who, being also duly sworn, did depose and say that he was the secretary of said company at the date of the execution of the foregoing indenture, and still is such secretary, and that the seal of said company was affixed to said instrument under and by virtue of the aforesaid resolutions, and that the seal thereto attached is the seal of said company, and that he saw the said Charles G. Scott sign and execute said indenture as said president, and that said instrument is the deed of said company, for the consideration and purposes therein mentioned and set forth.

In witness whereof I, George W. McDiamid, clerk as aforesaid, have hereunto set my hand and affixed the seal of my office, in the city of Little Rock, in said county of Pulaski, this twentieth day of June, A. D. 1870.

[L. S.] G. W. McDIAMID, *Clerk.*

(Indorsed:) 139. No. 1. Little Rock & Fort Smith Railroad Co. to Henry W. Paine et als., trustees. Land mortgage. $5,000,000. Henry W. Paine, Wm. B. Stevens, and C. W. Huntington vs. L. R. & Ft. Smith R. R. Co. et al. Exhibit A. Filed May 26, '74. Ralph L. Goodrich, clerk.

40 Which subpœna is as follows:

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the Saint Louis Railway Supplies Manufacturing Company, which is served with the Little Rock and Fort Smith Railroad Company, et al., greeting:

We command and strictly enjoin upon you, that, laying all other matters aside, and notwithstanding any excuse, you, and each of you, be and personally appear before the judges of our circuit court of the United States in and for the eastern district of Arkansas, in chancery sitting, on the sixth day of July, A. D. eighteen hundred and seventy-four, it being the first Monday of July next, wheresoever the said court shall then be, and there to answer a bill of complaint exhibited against you in our said court by Henry W. Paine et al., and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under penalty of what the law directs.

In testimony whereof Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed this twenty-sixth day of May, A. D. eighteen hundred and seventy-four, and in the ninety-eighth year of our Independence.

Attest:
[L. S.] RALPH L. GOODRICH, *Clerk.*

N. B.—The defendant is required to enter her appearance in the above cause in the clerk's office of this court, on or before the sixth day 41 of July, eighteen hundred and seventy-four, or the bill will be taken pro confesso against her.

RALPH L. GOODRICH, *Clerk.*

I have served the within subpœna on the within named John G. Alexander, secretary Saint Louis Railway Supplies Manufacturing Company, at St. Louis, in the eastern district of Missouri, on this first day of June, A. D. eighteen hundred and seventy-four.

C. A. NEWCOMB,
U. S. Marshal for East. Dist. of Missouri,
By WLILIAM H. BIERSTADT,
Deputy Marshal.

Returned and filed June eighth, eighteen hundred and seventy-four.

RALPH L. GOODRICH, *Clerk.*

Before the clerk at rules, June first, eighteen hundred and seventy-four.

Henry W. Paine et al.
vs.
The Little Rock and Fort Smith Railroad Company et al.

Come this day the defendants Rose and Brown, by Rose and Green, esquires, their solicitors, and file herein their demurrer to the bill of complaint.

Which demurrer is in the words and figures following, to wit:

United States circuit court, eastern district of Arkansas.

42 Henry W. Paine et als., plaintiffs,
vs.
Little Rock and Fort Smith Railroad Company et als., defendants. } In chancery.

And the said defendants U. M. Rose and Benton J. Brown come, and for defence herein they say that it appears from the face of the said bill that the plaintiffs have no equity herein. They therefore pray judgment, &c.

Rose and Green.

Filed June first, eighteen hundred and seventy-four.

RALPH L. GOODRICH, *Clerk.*

United States of America,
Eastern District of Arkansas:

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the thirteenth day of April, anno Domini one thousand eight hundred and seventy-four, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on July sixth, eighteen hundred and seventy-four:

HENRY W. PAINE, WM. B. STEVENS, AND CHARLES W. HUNTINGTON, TRUSTEES,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

43 And now on this day came the plaintiffs, by Clark and Williams and Yonley, attorneys, file their petition herein representing that after the commencement of this suit, to wit, on the 26th day of May, eighteen hundred and seventy-four, Elisha Atkins and Samuel H. Gookin, both citizens of the State of Massachusetts, were duly appointed trustees in the said land mortgage in the place and stead of Henry W. Paine and William B. Stevens, resigned, and praying that said Atkins and Gookin might be substituted in the place and stead of said Paine and Stevens as plaintiffs herein.

And thereupon it is ordered that said Elisha Atkins and Samuel H. Gookin be, and they are hereby, substituted and made parties plaintiffs to this suit in the place and stead of the said Henry W. Paine and William B. Stevens, and that the cause proceed hereafter in the names of said Charles W. Huntington, Elisha Atkins, and Samuel H. Gookin, plaintiffs.

Which petition and exhibit are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

WILLIAM B. STEVENS, HENRY W. PAINE, AND Charles W. Huntington
vs.
LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

And your orators would further represent that since the filing of the original bill herein, to wit, on the twenty-sixth of May, eighteen hundred and seventy-four, your orators, William B. Stevens and Henry W. Paine, resigned their trusteeship in the said land mortgage mentioned in the original bill, and Elisha Atkins and Samuel H. Gookin, both of Boston, in the State of Massachusetts, were nominated and appointed by the continuing trustee as trustees aforesaid in their
44 place and stead, which said nomination and appointment was on the same day duly ratified and approved by the said Little Rock and Fort Smith Railroad Company, all in pursuance of the provisions of said deed of trust; all of which, by the resolutions of said board of directors of said company, a copy of which duly certified under the seal of the company is hereto annexed marked Exhibit A, reference thereunto being had will appear.

Now, therefore, your orators pray that the said Elisha Atkins and Samuel H. Gookin may be substituted in the record in the place of said Paine and Stevens, and stand with the said Charles W. Huntington as parties plaintiffs herein, and that the cause proceed in their names. And your orators will ever pray.

CLARK AND WILLIAMS,
T. D. W. YONLEY,
For Plaintiffs.

Filed July sixth, eighteen hundred and seventy-four.
RALPH L. GOODRICH, *Clerk.*

At a meeting of the board of directors of the Little Rock and Fort Smith Railroad Company, held at the city of Little Rock, Arkansas, on the 26th day of May, eighteen hundred and seventy-four, the following preamble and resolutions were adopted, to wit:

Whereas Henry W. Paine and William B. Stevens, who were associated with Charles W. Huntington, successor to Samuel T. Dana, in the deed of trust and mortgage of the lands of said company bearing date the twentieth day of June, eighteen hundred and seventy, and by said company executed, did, on or about the twenty-sixth day of May, eighteen hundred and seventy-four, resign their said trust and discharge themselves thereof by giving notice in writing of said resignation
45 to said company and to the continuing trustee; and whereas the said Charles W. Huntington, successor of said Samuel T. Dana, aforesaid, did, by virtue of the power vested in him by said deed of trust and mortgage as the continuing trustee, appoint Elisha Atkins and Samuel H. Gookin, of Boston, in the county of Suffolk and State of Massachusetts, to be the successors of said Henry W. Paine and William B. Stevens in said trust, subject to the consent of said company:

Now therefore be it resolved that we do hereby ratify and approve the nomination of the said Samuel H. Gookin and Elisha Atkins as the successors of the said Henry W. Paine and William B. Stevens in the trust created by the said deed of trust and mortgage.

OFFICE SECRETARY LITTLE ROCK AND
FORT SMITH RAILROAD COMPANY,
Little Rock, July third, eighteen hundred and seventy-four.

I, John C. Peay, secretary of the board of directors of the Little Rock and Fort Smith Railroad Company, do hereby certify that the foregoing preamble and resolution is a true copy taken from the records of the said board of directors.

Given under my hand as secretary of said board of directors, and the seal of said company, this third day of July, eighteen hundred and seventy-four.

[L. S.] JNO. C. PEAY,
Secretary L. R. and F't S. R. R. Co.

Filed July sixth, eighteen hundred and seventy-four.

RALPH L. GOODRICH, *Clerk.*

46 Before the clerk at rules, August third, eighteen hundred and seventy-four.

CHARLES W. HUNTINGTON, ELISHA ATKINS, and Samuel H. Gookin, trustees, &c., plaintiffs,

vs.

LITTLE ROCK AND FORT SMITH RAILROAD Company, Thomas C. Peek, J. D. Plose, John H. Haney, John J. Clendennen, Robert C. Bruce, and Harvey Lewis, surviving partners of the late firm of Bruce, Butler, and Company; Augustus H. Garland and Lucius B. Nash, late partners under the firm name of Garland and Nash; Augustus H. Garland, Henry Kyles, Uriah M. Rose, Wilson B. Gibson, and Benton J. Brown.

And now, on this day, came the plaintiffs, by Clark and Williams and

Yonley, their attorneys; and the following-named defendants, to wit, Little Rock and Fort Smith Railroad Company, Thomas C. Peek, J. D. Plose, John J. Clendennen, Robert C. Bruce, Harvey Lewis, A. H. Garland, Henry Kyles, and Wilson B. Gibson, being called came not, but made default. Whereupon it appearing that each and all of said defendants have been duly and in due time served with notice herein, it is, upon the plaintiffs' motion, ordered that the said plaintiffs' original and amended petition, and the matters and things therein contained, be, and the same are hereby, taken as confessed against the said defendants so in default; and thereupon the plaintiffs filed their general replication to the answer of said defendant, John H. Haney.

47 Which replication is as follows:

U. S. circuit court, east. dist. of Arkansas.

CHARLES W. HUNTINGTON, SAMUEL H. GOOKIN, and Elisha Atkins, trustees,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD COMPANY et al.

The plaintiffs, by their attorneys, Clark and Williams and Yonley, come, and saving and reserving unto themselves all manner of advantage and exception, &c., for replication to the answer of said Henry Kyles, say that they will aver and prove their said bill and amended bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and they pray, as in and by their said bill they have already prayed.

YONLEY,
CLARK AND WILLIAMS,
For Plaintiffs.

Filed August third, eighteen hundred and seventy-four.
RALPH L. GOODRICH, *Clerk.*

48 UNITED STATES OF AMERICA,
Eastern district of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the twenty-sixth day of October, anno Domini one thousand eight hundred and seventy-four, at the United States court room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November second, eighteen hundred and seventy-four.

CHARLES W. HUNTINGTON, ELISHA ATKINS,
and Samuel H. Gookin, trustees,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD COMPANY et al.

And now on this day come the plaintiffs and file their motion for a decree pro confesso against U. M. Rose and B. J. Brown, defendants, and their further motion to set this case for hearing now, at the present term of this court, upon the original and amended bills and exhibits thereto, the answers of John H. Haney, Henry Kyles, exhibits and replications thereto, and upon the bill taken as confessed against all other defendants, and thereupon the defendant U. M. Rose appeared, and on his motion the consideration of said motion was deferred until Monday, November second, and on the same day came the said defendants, Elisha Atkins, William E. Bates, Ebenezer T. Farrington, Francis M. Weld, Henry Saltonstall, John Gardner, Thomas H. Perkins, and David D. Stackpole, by S. H. Gookin, their agent, and enter their appearance in this case and consent to a hearing of said case at the present term, and
to a decree for the plaintiffs according to the prayer of said bill.
49 Which motion is as follows:

CHARLES W. HUNTINGTON, SAMUEL H. GOOKIN,
trustees, &c.,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD COMPANY et al.

The plaintiffs, Charles W. Huntington and Samuel H. Gookin, trustees, &c., present this their motion, and thereupon represent that by the allegations and prayer of their said original and *ma*ended bill it appears that another section of twenty additional miles of said railroad will have to be built and equipped on or before the thirteenth day of May, eighteen hundred and seventy-five. That the said defendants the railroad company is insolvent and utterly unable to comply with their implied covenants in the said mortgage to complete the same within said time, whereby the forfeiture of said grant of lands is inevitable unless said plaintiffs can obtain a decree of this court for the foreclosure of said mortgage and a sale of said road and lands in time for the purchaser or purchasers thereof to prepare and construct the same. And further represent that, as appears by said bill, none of the defendants except the Little Rock and Fort Smith Railroad Company and the said defendants bondholders and their trustees have any interest in this suit except as judgment creditors of the said company, whose liens are subsequent and inferior to the lien of said mortgage, and whose rights, if any they have, can be equally well preserved by a transfer of such liens to the fund produced by the sale of said mortgaged property. And they further represent that their said original and amended bill have been taken as confessed against all of the defendants except John H. Haney and
Henry Kyles and said bondholders defendants; the said Haney and
50 Kyles have answered, and U. M. Rose and B. J. Brown who have
failed to answer or respond, although duly served with notice.

They therefore move that said original and 'mended bills may be taken as confessed against the said Rose and Brown, and the said defendant the railroad company, and said bondholders, consenting thereto, that the case may be set down for hearing presently at this term of the court upon the bill and exhibits thereto, the answers of said defendants Haney and Kyles, exhibits thereto and replications, and upon the bill taken as confessed against all other defendants.

YONLEY,
CLARK AND WILLIAMS,
For Plaintiffs.

Filed October thirty-first, eighteen hundred and seventy-four.
RALPH L. GOODRICH, *Clerk.*

And on November third, eighteen hundred and seventy-four, as follows:

CHARLES W. HUNTINGTON ET AL.
vs.
LITTLE ROCK AND FORT SMITH RAILROAD COMPANY et al.

And now on this day come the plaintiffs, by Clark and Williams, and it appearing that the defendants The Saint Louis Railway Supplies Company are non-residents of the State, and cannot be served with notice in this case, it is ordered, on motion of plaintiffs, that this suit be dismissed as to them, and that plaintiffs have leave to strike their names from the complaint.

And come the defendants The Saint Louis Railway Supplies Manufacturing Company, The Little Rock and Fort Smith Railroad Company, by Rose and Green, their solicitors, and file herein their motion to set aside the decree pro confesso herein.

51 Which motion is as follows:

In the United States circuit court, eastern district of Arkansas.

HUNTINGTON ET AL.
vs.
LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

And the said defendant The Little Rock and Fort Smith Railroad Company comes and moves the court to set aside the decree pro confesso rendered against her herein for the reasons set forth in the annexed affidavits.

ROSE AND GREEN.

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, B. F. Danley, president of the Little Rock and Forth Smith Railroad Company, do solemnly swear that at and before the commencement of this suit, and until the present time, Sol. F. Clark, esq., was the regularly retained attorney, engaged by the year, to attend to all her legal business, and that she had no other; that the chief management of said company was devolved on affiant as her president; that at the time of the service of the subpœna herein on the secretary of the company, affiant was absent from the State, in very ill health, and unable to attend to business, and that he remained thus absent and ill until the thirteenth day of October last; that he relied upon the attorney of the company to attend to all legal business which she might have either then

or at any other time, and that he did not know until a week ago that this suit was pending, that Mr. Clark was the solicitor of the plaintiffs, and that a decree pro confesso had been rendered against the company Had he known the pending of the suit and that Mr. Clark was acting as counsel on the other side instead of for the company, he should
52 have employed other counsel to examine the case and to take all measures necessary to protect the interests of said defendant. He believes that if said decree is set aside the company can make a good and valid defence to a large part of said demands set up in said bill and can show that over one million one hundred and twenty-five thousand dollars of said bonds were fraudulently and illegally issued; as to how many more of said bonds were illegally issued he cannot now say, but offers to show by answer, as soon as a thorough examination of the books and papers of said company can be made, that is to say within a very reasonable time.

B. F. DANLEY,
Pres't of L. R. & F. S. R. R.

Subscribed and sworn to before me this third day of November, eighteen hundred and seventy-four.

C. T. WALKER,
Notary Public.

Filed November third, eighteen hundred and seventy-four.

RALPH L. GOODRICH, *Clerk.*

And on November fifth, eighteen hundred and seventy-four, as follows:

CHARLES W. HUNTINGTON ET AL.
vs.
LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

Comes the Little Rock and Fort Smith Railroad Company, by E. W. Kimball, esq., solicitor, and files herein its motion to set aside the decree pro confesso herein, and also the affidavits of Stoddard, Oli-
53 ver and Cooper; and comes the said defendant, by Rose and Green, it' solicitors, and file herein their retainer by said company.

Which motion is as follows:

In the United States circuit court for the eastern district of Arkansas.
In chancery.

HUNTINGTON ET AL. *vs.* LITTLE ROCK AND FORT SMITH RAILROAD Company.	Numbers one hundred eight and one hundred and thirty-nine.

And now come the Little Rock and Fort Smith Railroad Company, by their attorneys, and move that any default heretofore entered, and any judgments heretofore taken against said company, in each of said cases, be set aside, and that time be given them to plead therein, for the reasons set forth in the affidavits herewith filed, averring that the pretended board of directors of said company, of which B. F. Danley, esq., is president, is not the board of directors of said company either in law or in fact, and has no right to represent the interests of said company.

EBEN W. KIMBALL,
Att'y for L. R. & F't Smith R. R. Company.

Filed November fifth, eighteen hundred and seventy-four.
RALPH L. GOODRICH.

And on November sixth, eighteen hundred and seventy-four, as follows:

54 CHARLES W. HUNTINGTON, SAMUEL H. Gookin, and Elisha Atkins, trustees, &c.,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

On this sixth day of November, eighteen hundred and seventy-four, this cause came on to be finally heard and was argued by counsel, upon consideration whereof it is ordered, adjudged, and decreed as follows:

That the mortgage set forth in said bill of complaint was regularly executed for the purpose of securing the payment of five thousand bonds of one thousand dollars each, amounting to the sum of five millions of dollars, to be issued thereunder, and that the whole amount of said bonds have been issued and that the said bonds together with the interest thereon, in accordance with the terms of said mortgage, are due and unpaid.

And it is further ordered, adjudged, and decreed, that unless the said defendants or some of them shall pay, or cause to be paid, to the said complainants, on or before the tenth day of December next, the aforesaid sum of five millions of dollars, together with all interest then due thereon, together with the costs of this suit, all equity of redemption on the part of said defendants or any of them under the said mortgage shall be foreclosed and forever barred, and all and singular the lands and premises in the said mortgage and exhibits thereto mentioned, to wit, all the right, title, and interest of the said The Little Rock and Fort Smith Railroad Company in and to all those lands and sections of land granted in and by an act of the Congress of the United States, approved July twenty-eighth, eighteen hundred and sixty-six, entitled "An act to revive and extend the provisions of an act 'granting the right of way and making a grant of lands to the States of Arkansas and Missouri, to aid in the construction of a railroad from a point upon the Mississippi opposite to the mouth of the Ohio River via Little Rock, to the Texas boundary line near Fulton in Arkansas, with branches to Fort Smith and the Mississippi River,' approved February ninth, eighteen hundred and fifty-three, and for other purposes," and by an act of the general assembly of the State of Arkansas, approved April twelfth, eighteen hundred and sixty-nine, entitled "An act supplemental to an 'act to incorporate the Little Rock and Fort Smith Railroad Company,' approved January twenty-second, eighteen hundred and fifty-five," and an act entitled "An act fixing the line of the Little Rock and Fort Smith branch of the Cairo and Fulton Railroad and granting the lands donated by Congress to the State in aid thereof, approved January nineteenth, eighteen hundred and fifty-five," for the construction of the railroad of the said The Little Rock and Fort Smith 55

Railroad Company from the city of Little Rock to the city of Fort Smith on the western boundary line of the State, being ten sections of or six thousand and four hundred acres per mile for each mile of said railroad, amounting in the aggregate to nine hundred and seventy-nine thousand two hundred acres more or less, and situated in said State of Arkansas adjoining and adjacent to the said line of railroad, except such portions thereof as the said The Little Rock and Fort Smith Railroad Company have heretofore sold, be sold together in one parcel, and that Charles P. Redmond, esq., of Little Rock, in said State of Arkansas, be and he is hereby appointed special commissioner to execute the above order of sale, and that such sale be made by public auction at the front door of the court-house of the circuit court of the United States for the eastern district of Arkansas, at said city of Little Rock, in Arkansas, on Thursday, the tenth day of December, A. D. eighteen hundred
56 and seventy-four, at eleven o'clock in the forenoon, and that the
time and place of said sale shall be publicly advertised by said special commissioner as follows, viz, a written or printed notice specifying the time and place of such sale shall be posted up in three public places in said city of Little Rock. A copy of such notice shall be printed and published for three successive weeks, at least three times in each week previous to such sale in the New York Herald, Boston Daily Advertiser, Boston Post, Chicago Daily Tribune, and Missouri Democrat, newspapers respectively published in the cities of New York, Boston, Chicago, and Saint Louis, and at least once in each week in the Arkansas Gazette and the Little Rock Republican, newspapers published in the city of Little Rock, which said notice shall describe the property to be sold as fully as the same is hereinbefore described.

And it is further ordered, adjudged, and decreed that upon said sale such special commissioner shall execute and deliver to the purchaser or purchasers of said mortgaged premises and property, a deed or deeds of the same, and that the terms and conditions of said sale shall be as follows, viz: that the purchaser be required on the acceptance of his bid to pay the sum of fifty thousand dollars cash or in United States Government bonds, and that the balance be secured upon the execution of said deed or deeds, and that the balance of said bid be secured by a deposit by the purchaser of the bonds of the United States Government of equal amount therewith in the office of said master, the said balance to be paid into the court at any time when required by the court and within thirty days after such requirement shall be made by an order of record to be entered in this cause, the said balance of said bid to bear interest at the rate of six per centum per annum, from the date of said bid until paid, a condition of said sale being also that unless the said purchaser shall pay said deferred purchase money within thirty days after requirement shall have been made as aforesaid, the said government bonds deposited as aforesaid shall be sold to the best advantage
57 of parties having rights in said funds to be derived from said sale
as the court shall direct. And it is further considered and decreed that all the bonds secured by the said deed of trust shall be filed in the said office of said master for participation in said fund in accordance with a scheme to be devised for that purpose, and reference is hereby made to said master to report a plan for notifying all of said bondholders of the pendency and object of this proceeding and the manner in which the validity of said bonds shall be presented and passed upon in his office. And it is further ordered that said Charles P. Redmond, esq., be and he is hereby appointed a special master herein.

And it is further considered that the defendants, Benton J. Brown and U. M. Rose, and any of the other defendants holding judgments against the said railroad company, shall have leave to present their claims against the fund to be derived from said sale at any time within thirty days from this date, and shall be entitled to litigate their said claims against said fund the same as they might have done against said property if this sale had not been decreed. And it is ordered and decreed that the purchaser at said sale deposit with the said commissioner at least fifty thousand dollars in United States currency or United States bonds to await the event of said litigation.

And it is considered that this cause be reserved for further directions.

And December 19th, eighteen hundred and seventy-four, as follows:

58 CHARLES W. HUNTINGTON, SAMUEL H. Gookin, and Elisha Atkins, trustees,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD COMPANY et al.
} No. 139.

And now, on this nineteenth day of December, A. D. eighteen hundred and seventy-four, Charles P. Redmond, who was appointed special commissioner and special master under the decree rendered in this cause, on the sixth day of November last past, personally appeared and submitted and filed a report of his acts and doings under and by virtue of said decree, and George O. Shattuck, Francis M. Weld and George Ripley, the purchasers of the property sold under said decree, being severally personally present, declare and state in open court and desire the same to be entered of record, that as purchasers of the property mentioned and described in the decree rendered, in the suit of Charles W. Huntington and Samuel H. Gookin against the Little Rock and Fort Smith Railroad Company et als., numbered 138, from the docket of this court, on the sixth day of November last past, they have organized a
corporation under an act of the general assembly of the State of
59 Arkansas, approved December ninth, eighteen hundred and sev-
enty-four, entitled "An act supplementary to an act entitled 'An act to provide for a general system of railroad incorporation,' approved July twenty-third, eighteen hundred and sixty-eight," and that any holder of the bonds secured by the mortgage foreclosed by this suit, as well as of the bonds secured by the mortgage foreclosed by the aforesaid suit numbered one hundred and thirty-eight, shall upon the transfer of his bonds and his right to any of the proceeds of the sale of the railroad or land grant under the aforesaid decrees in said suits numbered one hundred and thirty-eight and one hundred and thirty-nine, within sixty days from the date of said corporation, unless further time be given by this court, be entitled to his proportional interest in the stock of said new corporation, upon the same terms and stipulations as any other holder of said bonds, but this shall not prevent such new corporation from requiring from any and all holders of said bonds the payment of his proportion of the expenses attending said sales and purchases, and of such other sums not exceeding five per cent. of the principal of said bonds, as said corporation may deem it for its interests to require, as a condition upon which said stock shall be delivered, provided that the same requirement shall be made of all the other holders of said bonds; and provided further, that this stipulation shall not limit the power of the aforesaid Shattuck, Weld and Ripley to organize said cor-

poration without notice, or of the corporation so organized to mortgage its property and to reserve for its own use an amount of its capital stock not exceeding ten per cent. thereof.

And the said Shattuck, Weld and Ripley severally personally request that an order may be entered in this cause directing the said Charles P. Redmond to convey to said corporation (the name of said corporation is the Little Rock and Fort Smith Railway), and to its successors and 60 assigns forever. all the right, title, and interest which they, the said Shattuck, Weld and Ripley, or either of them, acquired by reason of the aforesaid purchase, under the aforesaid decree, rendered in this suit.

And the aforesaid Huntington, and Gookin, and Atkins, trustees, being severally personally present, state in open court that they do not object, but consent to the confirmation of the sales held under and by virtue of the aforesaid decrees, rendered in the suit numbered one hundred and thirty-eight, and that the title to the property sold under the aforesaid decree, rendered in this suit, shall become vested in such new corporation, under the name of the Little Rock and Fort Smith Railway, upon condition that the aforesaid stipulations of the substance thereof be embodied in the decrees approving and confirming said sales.

Whereupon, after due deliberation, it is ordered, adjudged, and decreed, that the aforesaid sale to the said Shattuck, Weld and Ripley, under the aforesaid decree rendered in this suit, numbered one hundred and thirty-eight be and the same is hereby approved, ratified and confirmed upon the stipulations that any holder of the bonds, secured by the mortgage foreclosed by this suit, as well as of the bonds secured by the mortgage foreclosed by the aforesaid suit numbered one hundred and thirty-eight, shall, upon the transfer of his bonds and his right to any of the proceeds of the sales of the railroad or land grant, under the aforesaid decrees in said suits numbered one hundred and thirty-eight and one hundred and thirty-nine, within sixty days from the date of the organization of said corporation, unless further time be given by the court, be entitled to his proportional interest in the stock of said new corporation, upon the same terms as any other holder of said bonds, but this shall not prevent such new corporation from requiring from any and all holders of said bonds the payment of his proportion of the expenses attending said sales and purchases, and of such other 61 sums, not exceeding five per cent. on the principal of said bonds, as said corporation may deem fit for its interests to require, as a condition upon which said stock shall be delivered, provided that the same requirement shall be made of all the other holders of said bonds; and provided further, that this stipulation shall not limit the power of the aforesaid Shattuck, Weld and Ripley to organize said corporation without notice, or of the corporation so organized to mortgage its property or to reserve for its own use an amount of its capital stock not exceeding ten per cent. thereof.

And said Charles P. Redmond, as such special commissioner and special master, is hereby directed to convey to said new corporation, under the name of the Little Rock and Fort Smith Railway, and to its successors and assigns, all the lands and property mentioned and described in the aforesaid decree rendered in this suit on the sixth day of November last past, but that said corporation shall, as a part of the consideration of such conveyance, compromise or pay such claims against the Little Rock and Fort Smith Railroad Company as C. W. Huntington, George Ripley and Henry A. Whitney may, within one year from the date hereof, approve, and upon such terms and in such manner as they may prescribe.

62 STATE OF ARKANSAS,
County of Pulaski:

We, George O. Shattuck, Francis M. Weld and George Ripley, the purchasers of the Little Rock and Fort Smith Railroad at the public sale on the tenth day of December last, being duly sworn, do depose and say:

That we, purchasing the property of the Little Rock and Fort Smith Railroad Company, did so in behalf of the persons whose names appear in the schedule hereto annexed, and who have expressly authorized us to act in their behalf, and that we believe that they are the holders of the amount of the mortgage bonds of said company set against their respective names, amounting in the aggregate to six million and ninety-five thousand dollars at par; that at a public meeting held in Boston, in the State of Massachusetts, after full notice to bondholders, published in the leading newspapers published in that city and in New York, a committee was appointed who requested us to act in the premises. That we believe that the scheme presented in the decree will be satisfactory to all the bondholders, and that we have received no intimation from any source that there will be any opposition to it. And we further say that after much consultation, and consultation with bondholders who have a large interest in these bonds, and who are familiar with the market for railroa' property, that it is in substance the only scheme which we have been able to devise which will protect the interests of all the bondholders. And we further declare on oath that said railroad and land grant were purchased for and in the interest of the holders of the bonds issued by said railroad company and secured by the mortgages on said railroad and land grant respectively, and that each and every holder of the bonds aforesaid are to share equally in all the rights, benefits and securities accrueing to any one of said
63 bondholders under said sale; that there is to be no discrimination against any holder of said bonds, and that they have no knowledge and no information that any holder of said bonds objects to the approval of said sales, but their information and belief is that all of the holders of both classes of said bonds desire the approval of said sales upon the terms and conditions mentioned in the decrees herewith submitted, and that the scheme presented in said decrees meets with the approval of all the bondholders, and that the same is for the best interests of all of said bondholders, and has been devised in good faith for the purpose of securing and protecting the interests of said bondholders and to secure the construction of said road and prevent the forfeiture of the land grant.

GEO. O. SHATTUCK.
F. M. WELD.
GEORGE RIPLEY.

Subscribed and sworn to before me this nineteenth day of December, A. D. eighteen hundred and seventy-four.

RALPH L. GOODRICH,
Clerk U. S. Circ't C't, E. D. A.

64 *Subscriptions to agreement of Nov. 21st, 1874.*

			1st mort.	Land grant.
1	J. G. Blaine	Augusta, Me	19	48
2	N. P. Hill	Boston	5	5
2	G. P. King, trustee	"	6	3
3	J. Prescott	"	6	5
4	C. F. Farrington	"	5	10
5	W. D. Pickman	"	14	10
6	G. Z. Silsbee	"	5	5
7	D. Hinckley	Bangor, Me.	10	10
8	Sam'l Little	Boston	5	5
9	E. N. Merriam	Ogdensberg, Miss	1	1
10	D. C. Judson	"	6	3
11	E. L. Baker	New Bedford, Mass	3	......
12	L. Saltonstall	Boston	15	15
13	E. T. Farrington	Boston	2	51
14	H. F. Newhall	Lynn, Mass	......	5
15	J. S. Robinson	Boston	6	6
16	S. Gould	"	5	5
17	B. E. Bates	"	86	160
17	" coll	"	5	118
17	" trustee	"	......	250
17	F. E. Woodbridge	Veigennes, Vt	15	15
17	Estate H. H. Hyde	Boston	30	30
17	H. B. Groves	"	13	13
17	S. H. Blake	Bangor, Me.	10	10
18	S. G. Rogers	Boston	10	10
19	M. F. Merrit	Stanford, Conn	5	5
20	R. Matthews	Cambridgeport, Mass	2	2
21	J. P. Robinson	New York	60	220
65				
22	W. C. Endicott	Salem	3	3
23	A. & P. Coburn	Skowhegan	50	......
24	N. C. Ayer	Bangor, Me.	3	3
25	C. W. Shattuck	Lawrence, Mass	4	4
26	J. Shattuck	" "	4	4
27	I Livermore	Boston	......	7
27	Michigan Cent. R. R	"	7	3
28	Larkin, Stackpole & Co	"	10	17
29	D. D. Stackpole	"	55	12
30	H. R. James	Ogdensburg, N. Y	10	13
31	J. W. Balch	Boston	5	5
31	Balch & Peabody	"	5	5
32	Mary A. Putnam	Bedford, Mass	8	......
33	H. A. Whitney	Boston	5	5
34	G. W. Read	New York	......	8
35	J. F. Guild	Boston	3	......
36	O. Ditson	"	6	4
36	J. H. Thomdike	"	2	2
37	E. F. Parker	Jamaica Plain, Mass	5	5
		Fo'ward	534	1,126
38	A. E. Hilduth	Cambridge, Mass.	22	4
39	R. C. Mackay	Boston	5	5
40	G. H. Mackay	"	23	49
41	Mackay & Philips	"	15	15
42	J. Greeley	"	3	2
43	H. A. Church	"	5	2
43	L. H. Brown	"	5	2
44	J. W. Davis	"	5	5
45	Ch. Cummings	"	25	25
46	Mrs. S. S. Curtis	"	2	2
66				
47	Wm. T. Hart, trustee	"	24	49
47	"	"	10	10
48	R. D. Rice	Augusta, Me	5	......
49	E. Atkins	Boston	282	476
49	W. F. Freeman	"	25	25
49	P. S. Shelton	"	14	24
49	W. Hilton	"	25	25
50	D. Alden	Augusta, Me	2	......
51	W. H. Smith	Bangor, "	4	4
52	Leonard, Sheldon & Foster	New York	10	22
52	W. B. Leonard	"	10	......

			1st mort.	Land grant.
53	C. V. Lord	Bangor, Me	3	3
54	W. P. Denckla	New York	43	28
17	F. M. Weld	Boston	80	80
17	A. Adams	"	25	25
17	W. Adams	"	13	17
17	E. L. Adams	"	13	16
55	A. B. Almon	"	......	15
56	A. S. French	W. Townsend, Mass	74	......
57	E. Lamson	Boston	25	55
58	L. Morse, trustee	"	10	10
59	C. Deane	Cambridge, Mass	5	5
60	H. O. Walker	Boston	4	4
61	C. G. Nazro	"	2	2
62	J. C. Pratt	"	......	8
62	H. H. Hummerwell	"	20	20
63	C. L. Young	"	4	4
64	C. Amory	"	55	51
65	G. E. Hersey, trustee	"	9	17
66	G. N. Macy	"	7	10
67				
67	G. Everett	"	10	10
67	J. E. Everett	"	5	5
68	G. W. Rogers	Salem, Mass	1	1
69	J. T. Coolidge	Boston	10	15
70	H. Saltonstall	"	......	23
70	H. Saltonstall, coll	"	50	20
71	R. C. Johnson	Belfast, Me	10	......
		Forward	1, 533	2, 316
	C. C. Richardson	Boston	20	20
73	A. A. Reed	Providence, R. I	5	5
17	R. E. Demmon	Boston	5	5
	J. M. Ellis	"	......	10
74	Wells, Fargo & Co	New York	......	55
			1, 563	2, 411
76	Mo., Kansas & T. R. Co		50	......
77	Door, Parks & Co		5	5
78	P. R. Hazeltine	Belfast, Me	5	......
79	O. H. Hanlon	150 Fremont 't, Boston	1	......
80	H. H. Emmons		5	5
81	Com. Warehouse Co	New York	160	......
	J. H. Bowler	Bangor, Maine	4	6
			1, 793	2, 427
	William Woodruff		......	17
	Morgan Jones		10	......
	Claiburn Watkins		1	14
	George O. Shattuck		13	7
	F. M. Weld, in trust		150	......
	" "		15	15
			1, 981	2, 480
68				
	C. Warner		140	......
	J. H. Converse		600	......
	S. H. Gookin		100	100
	E. Atkins		484	......
	Edw'd Matthews		250	......
			3, 555	2, 580

Filed Dec. 19, 1874.

RALPH L. GOODRICH, *Clerk.*

On May fourteenth, eighteen hundred and seventy-five, the following master's report was filed, to wit:

Master's report.

Circuit court of the United States, eastern district of Arkansas.

CHARLES W. HUNTINGTON, SAMUEL H. GOOKIN, and Elisha Atkins, trustees, &c.,
vs. } 139.
THE LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

In accordance with the order of the court, the master in this cause would respectfully report, that there is now in the registry of the court in this cause the sum of thirty-nine thousand five hundred and forty-three dollars and ninety cents ($39,543.90.)

That the demands against said fund accrued and to accrue, excepting the distribution under the decree, are as follows:

Attorney's fees	None.
Master's allowance and fees estimated	$1,500 00
69 Clerk's fees, due 21.30; estimated 30.00, say	$50 00
Clerk's percentage on amt. rece'd & p'd	$390 00
Marshal, estimated	$25 00
Trustees' claim for services and expenses	$13,100 00
Advertisements, estimated	$600 00
Judgment U. M. Rose, superseded, 4,750.00	$5,000 00
Total charges on fund	$20,665 00
Amount on hand	39,543 90
Charges on fund	20,665 00
Amount for distribution	18,878 90

All of which is respectfully submitted by—

CHARLES P. REDMOND, *Master.*

MAY 14, 1875.

Filed May fourteenth, eighteen hundred and seventy-five.

RALPH L. GOODRICH, *Clerk.*

70 Circuit court of the United States, eastern district of Arkansas.

CHARLES W. HUNTINGTON, SAMUEL H. GOOKIN, Elisha Atkins, trustees,
vs.
THE LITTLE ROCK AND FORT SMITH RAILROAD Company.

To the honorable the justices of the circuit court of the United States holden at Little Rock, within and for the eastern district of Arkansas:

Respectfully represents your petitioner, Charles H. Richardson, Frank Shaw, and David S. Greenough, of Boston, in the commonwealth of Massachusetts, that they are the holders of a large amount of the bonds secured by the mortgage to foreclose which the above entitled suit was brought. The amount held by each is set forth in the schedule hereto attached. That having full confidence in the plaintiffs therein, by whom, as trustees for your petitioner and all other owners of said bonds, the said mortgage was held, and believing that they would act in all respects so as to protect and advance the interests of the bondholders whom they represented, your petitioners trusted wholly to them the care and management of said suit, and by reason of such trust did not personally attend at the sale of the property covered by said mortgage which was made under the order of this court nor at the hearing on the question whether such sale should be confirmed.

71 That the property covered by said mortgage was fully worth and would have brought at a properly conducted public sale not less than five hundred thousand dollars.

That, as your petitioner is informed and believes, that said Huntington, Gookin, and Atkins, the said trustees, in total disregard of the interests of your petitioner and the other holders of said bonds, and their duty as said trustees, agreed with George O. Shattuck, Francis M. Weld, and George Ripley, that they should be allowed to purchase all said property for an entirely inadequate consideration, to wit, for the sum of fifty thousand dollars, in consideration that the said Shattuck, Weld, and Ripley should pay in addition to said sum a certain other large sum of money not to the said trustee for the benefit of your petitioner and the other holders of the bonds secured by said mortgage, who as such were and are justly entitled to receive all the proceeds of the property covered thereby, but to certain persons having claims against the said railroad corporation, the respondent in the case, which were unsecured by said mortgage and who have no title to share in the proceeds of said property.

That in pursuance of said agreement the said Shattuck, Weld, and Ripley, at the sale made under the order of this court, bid for said property the said agreed sum of fifty thousand dollars, which is entirely insufficient to pay the bonds secured by the said mortgage, and the said Huntington, Gookin, and Atkins assented to said sale, and consented that the same should be confirmed by this court, and acting in concert with said Shattuck, Weld, and Ripley, procured to be inserted in the decree of confirmation the condition that as part of the considera-

72 tion for the conveyance of said mortgaged property the new corporation formed by the said purchasers should compromise and pay such claims against the Little Rock and Fort Smith Railroad Company as said Huntington and Ripley and one Henry A. Whitney should approve within one year from the date of said confirmation.

That the claims against said company which under said conditions may be paid amount to many times the said amount bid at the sale, and that said condition is in no respect beneficial to, but, on the contrary, is directly injurious to your petitioner and the other bondholders for whose benefit said sale was made, in that if they shall select to surrender their bonds in exchange for an interest in the stock of the new corporation, they will take their property subject to claims the amount of which is wholly uncertain, except that it is limited only by the indebtedness of the corporation respondent; so that the effect of the sale, as confirmed with said condition, is that your petitioner and the other holders of said bonds, instead of having a prior lien upon all the property covered by said mortgage, are allowed to become possessors of the same property, subject to all the debts of said respondent corporation to which their claim was formerly preferred; while if, on the other hand, they elect not to surrender their said bonds in exchange for stock in said new corporation, their property is taken from them, and the greater part of the proceeds thereof paid to persons who have no legal or equitable claim thereto, while their bonds remain almost wholly unpaid.

That your petitioner is informed and believes that among the claims against the Little Rock and Fort Smith Railroad Company so ordered to be paid are claims of said Atkins and said Weld, and that said agreement between the said trustees and said purchasers was made with the intent that the claims of said persons should be paid in full out of
73 money justly belonging to your petitioner and the other holders of said bonds, and was therefore a gross breach of the trust accepted by said trustees when they received the appointment and consented to act as such.

That the new corporation which said purchasers have formed has been organized, and that the said Atkins and Weld have been chosen directors thereof, and have also been elected members of the executive committee of the directors, composed of four directors, which is charged with the immediate supervision and control of the affairs of the said corporation, so that the interests of said corporation and of your petitioner and the other bondholders, should they elect to become stockholders therein, are without proper representation or protection before the committee appointed as aforesaid to approve the claims against the old corporation, which are to be paid by the new, since the parties who present' or allowance such claims control the corporation which should defend against them.

Forasmuch, therefore, as the rights of your petitioner are left without adequate protection, and will be entirely sacrificed unless proceedings under said decree of confirmation are stayed, he prays that the decree made in this case on the 21st day of December, A. D. 1874, may be modified by striking out the clause thereof which requires the said new corporation to pay, as a part of the consideration for the conveyance of said mortgaged property, the claims against said Little Rock and Fort Smith Railroad Company therein referred to, and that the time within which the holders of the bonds secured by said mortgage may, according to the provisions of said decree, upon the transfer of
74 their bonds and their right to any of the proceeds of said sale, be entitled to a share in the stock of said new corporation, may be extended until the question whether such modification be ordered shall be decided.

CHAS. H. RICHARDSON,
BROWN & FORD,
Attorneys.

U. S. A.,
District of Massachusetts :

FEBRUARY 17, A. D. 1875.

Then personally appeared the said Charles H. Richardson and made oath that the foregoing petition by him subscribed is true.

Before me.

ELIAS MERWIN,
Commissioner of U. S. Circuit Court.

Filed Feb'y 22, 1875.

RALPH L. GOODRICH, *Clerk.*

Circuit court of the United States, eastern district of Arkansas.

C. W. HUNTINGTON ET ALS., TRUSTEES,
vs.
THE LITTLE ROCK AND FORT SMITH RAILroad Co.

In the matter of the petition of Charles H. Richardson, for a modification of the decree in the above entitled case made on the 21st day of December, A. D. 1874.

75 Charles H. Richardson, the said petitioner, being first duly sworn, on oath depose and say, that I never entered into any agreement or arrangement of any sort with any association of bondholders or other persons having in view the purchase of the property covered by the mortgages made by the Little Rock and Fort Smith Railroad Company described in my said petition; that I never gave any person any power of attorney, or in any way authorized any person to act for me in reference to such purchase; and that I never assented, or authorized any person in my behalf, to assent to the said decree, or in any way to represent or act for me in the proceedings instituted for the foreclosure of said mortgages, but relied on the trustees to protect my interests as a bondholder.

CHAS. H. RICHARDSON.

DISTRICT OF MASSACHUSETTS:

MARCH 2, A. D. 1875.

There personally appeared the said Charles H. Richardson and made oath that the foregoing affidavit herein subscribed is true.

Before me.

ELIAS MERWIN,
Commissioner of the U. S. Circuit Court for the District of Massachusetts.

Circuit court of the United States, eastern district of Arkansas.

76 CHARLES W. HUNTINGTON, SAMUEL H. Gookin, and Elisha Atkins, trustees,
vs.
THE LITTLE ROCK AND FORT SMITH RAILroad Company.

Answer of trustees to the petition of Charles H. Richardson.

Respectfully represent Charles W. Huntington, Samuel H. Gookin, and Elisha Atkins, trustees and complainants as aforesaid, that they are ignorant personally whether the said Charles H. Richardson is the holder of any and if any how many mortgage bonds, but are informed and believe the number of bonds held by him secured by the mortgage of which the complainants were trustees does not exceed five, and that they are ignorant to what extent if at all, the petitioner has trusted to them the management of said suit, or for what reason he neglected to attend the sale ordered by this court, and the hearing on the question of confirming said sale.

But the complainants allege that said Richardson was fully informed of the pendency of said suit, of the order for sale, of the time and place

appointed for the same, and of the price at which said land grant was purchased; and the complainants deny that said property was worth or would have brought at a properly conducted sale not less than five hundred thousand dollars; and the complainants say that said property was fairly and openly sold at public auction after proper advertisement of the time and place of sale by a special commissioner of this court duly appointed for that purpose and in pursuance of its decree; and the complainants deny that they made the agreement in said petition alleged
with George O. Shattuck, Francis M. Weld, and George Ripley,
77 relating to the purchase of said property; and they deny that
they made any agreement with said persons relating thereto; and they deny that said Shattuck, Weld, and Ripley made any bid at said sale in pursuance with any agreement with them made, and the complainants say that they had no control over said sale, and no authority to purchase or sell thereat; and they deny that they in any way disregarded the interests of the petitioner and other holders of said bonds, and allege that they used every exertion to promote the interests of the bondholders, and secure the highest price for the mortgaged property at said sale, and subsequently to secure the most favorable terms for bondholders who might desire to become members of the corporation formed by the purchasers.

And the complainants further say, on information and belief, that said Shattuck, Weld, and Ripley acted under a power of attorney from a majority of the bondholders of both classes of bonds, and with authority from other persons holding bonds and claims who did not sign said powers.

That they bid for the mortgaged property and purchased the same at the price of fifty thousand dollars which they paid in cash in accordance with the decree of this court, and that before making said bid they announced publicly that all holders of bonds of either class would be allowed to share in the new organization of the road, if they purchased it, on the same terms as the bondholders represented by them.

That prior to said sale, but subject to the insolvency of said company, materials had been furnished for the equipment and running of the road and about fifty miles of railroad had been constructed with the consent of the trustees and very many of the bondholders for the purpose of securing to the company the land grant subject to said mortgage, and
that large expenditures had been made for the purposes aforesaid
78 by persons who claimed to have equitable liens upon the mort-
gaged property for such expenditures; that in order to prevent the forfeiture of a further and valuable portion of said land grant it was necessary to construct about twenty additional miles of road before the thirteenth day of May, 1875.

That in order to prevent objections to said sale on the part of the persons holding claims as aforesaid, and to secure harmonious co-operation in constructing said road, and to raise funds for the same, it was deemed by said purchasers necessary to recognize the aforesaid claims in the organization of a new corporation for the control and management of the road and land grant in the manner and to the extent proposed by said decree.

That at the request of the complainants and in accordance with the statements made by them at the sale, said Shattuck, Weld, and Ripley agreed to the insertion in the decree of a clause authorizing all bondholders to become members of the new corporation by them organized, on the same terms with the holders of bonds represented by them; that the total amount of claims referred to does not exceed four or five per

Circuit court of the United States, eastern district of Arkansas.

C. W. HUNTINGTON ET ALS., TRUSTEES,
vs.
THE LITTLE ROCK AND FORT SMITH RAILroad Co.

In the matter of the petition of Charles H. Richardson, for a modification of the decree in the above entitled case made on the 21st day of December, A. D. 1874.

75 Charles H. Richardson, the said petitioner, being first duly sworn, on oath depose and say, that I never entered into any agreement or arrangement of any sort with any association of bondholders or other persons having in view the purchase of the property covered by the mortgages made by the Little Rock and Fort Smith Railroad Company described in my said petition; that I never gave any person any power of attorney, or in any way authorized any person to act for me in reference to such purchase; and that I never assented, or authorized any person in my behalf, to assent to the said decree, or in any way to represent or act for me in the proceedings instituted for the foreclosure of said mortgages, but relied on the trustees to protect my interests as a bondholder.

CHAS. H. RICHARDSON.

DISTRICT OF MASSACHUSETTS:

MARCH 2, A. D. 1875.

There personally appeared the said Charles H. Richardson and made oath that the foregoing affidavit herein subscribed is true.

Before me.

ELIAS MERWIN,
Commissioner of the U. S. Circuit Court for the District of Massachusetts.

Circuit court of the United States, eastern district of Arkansas.

76 CHARLES W. HUNTINGTON, SAMUEL H. Gookin, and Elisha Atkins, trustees,
vs.
THE LITTLE ROCK AND FORT SMITH RAILroad Company.

Answer of trustees to the petition of Charles H. Richardson.

Respectfully represent Charles W. Huntington, Samuel H. Gookin, and Elisha Atkins, trustees and complainants as aforesaid, that they are ignorant personally whether the said Charles H. Richardson is the holder of any and if any how many mortgage bonds, but are informed and believe the number of bonds held by him secured by the mortgage of which the complainants were trustees does not exceed five, and that they are ignorant to what extent if at all, the petitioner has trusted to them the management of said suit, or for what reason he neglected to attend the sale ordered by this court, and the hearing on the question of confirming said sale.

But the complainants allege that said Richardson was fully informed of the pendency of said suit, of the order for sale, of the time and place appointed for the same, and of the price at which said land grant was purchased; and the complainants deny that said property was worth or would have brought at a properly conducted sale not less than five hundred thousand dollars; and the complainants say that said property was fairly and openly sold at public auction after proper advertisement of the time and place of sale by a special commissioner of this court duly appointed for that purpose and in pursuance of its decree; and the complainants deny that they made the agreement in said petition alleged with George O. Shattuck, Francis M. Weld, and George Ripley, 77 relating to the purchase of said property; and they deny that they made any agreement with said persons relating thereto; and they deny that said Shattuck, Weld, and Ripley made any bid at said sale in pursuance with any agreement with them made, and the complainants say that they had no control over said sale, and no authority to purchase or sell thereat; and they deny that they in any way disregarded the interests of the petitioner and other holders of said bonds, and allege that they used every exertion to promote the interests of the bondholders, and secure the highest price for the mortgaged property at said sale, and subsequently to secure the most favorable terms for bondholders who might desire to become members of the corporation formed by the purchasers.

And the complainants further say, on information and belief, that said Shattuck, Weld, and Ripley acted under a power of attorney from a majority of the bondholders of both classes of bonds, and with authority from other persons holding bonds and claims who did not sign said powers.

That they bid for the mortgaged property and purchased the same at the price of fifty thousand dollars which they paid in cash in accordance with the decree of this court, and that before making said bid they announced publicly that all holders of bonds of either class would be allowed to share in the new organization of the road, if they purchased it, on the same terms as the bondholders represented by them.

That prior to said sale, but subject to the insolvency of said company, materials had been furnished for the equipment and running of the road and about fifty miles of railroad had been constructed with the consent of the trustees and very many of the bondholders for the purpose of securing to the company the land grant subject to said mortgage, and that large expenditures had been made for the purposes aforesaid 78 by persons who claimed to have equitable liens upon the mortgaged property for such expenditures; that in order to prevent the forfeiture of a further and valuable portion of said land grant it was necessary to construct about twenty additional miles of road before the thirteenth day of May, 1875.

That in order to prevent objections to said sale on the part of the persons holding claims as aforesaid, and to secure harmonious co-operation in constructing said road, and to raise funds for the same, it was deemed by said purchasers necessary to recognize the aforesaid claims in the organization of a new corporation for the control and management of the road and land grant in the manner and to the extent proposed by said decree.

That at the request of the complainants and in accordance with the statements made by them at the sale, said Shattuck, Weld, and Ripley agreed to the insertion in the decree of a clause authorizing all bondholders to become members of the new corporation by them organized, on the same terms with the holders of bonds represented by them; that the total amount of claims referred to does not exceed four or five per cent. of the land-grant and first mortgage bonds; that the complainants believed that the price at which said property was sold was the largest cash price which could be obtained for the same at said auction, and that the conveyance of said property to a new corporation on the terms set forth in the decree of this court, extinguishing said claims and raising said funds to construct said extension and secure said land-grant, was calculated to promote the best interests of the bondholders; that after full consideration and for the reasons above set forth, the complainants assented to said sale, and to the decrees of this court confirming said sales; and they deny that they so assented by reason of any agreement with said purchasers at or prior to said sale.

79 And the complainants say that all the matters aforesaid were fully stated and explained to the court, and that thereupon said decree was entered confirming said sale; and the complainants further say that since the said sale was confirmed one hundred and eighty bondholders, representing bonds to an amount of nearly eight millions, out of a total of eight millions five hundred thousand, of both issues, have become stockholders and bondholders in said new corporation under the terms of said decree, and have surrendered their old bonds and have paid in money to said corporation as provided in said decree, and that about twenty miles of road have been constructed by said new corporation at an expense of about three hundred thousand dollars; and that said moneys have been paid in and expended on the faith of said decree.

And the complainants deny that said condition is in no respect beneficial, and deny that it is directly injurious to your petitioner and the other bondholders for whose benefit said sale was made, and they say that said condition, by enabling the new corporation to raise money to extend its road, has already proved of great benefit to all the holders of bonds who have elected to exchange them for stock; and these complainants admit that said Atkins and Weld hold claims which may be referred to the said referees, as provided by said decree; and they admit that said Atkins and Weld have been chosen members of the board of directors consisting of nine members, and that they have also been elected members of the executive committee of said board; but they deny that the interests of the petitioner and the other bondholders who may become stockholders in said new road, are without
protection, and allege that the interests of the petitioner
80 are identical with those of the hundred and eighty bondholders
who have already become members of said corporation, and say that said Atkins and Weld were elected directors of said new corporation with the full knowledge on the part of its stockholders of their said claims and all matters relating thereto, and in the belief that the interests of the said new corporation would be best promoted by their election.

And the complainants say that the terms of the said decree cannot now be amended without the consent of the purchasers at said sale and of said new corporation. And that any amendment of said decree would greatly disturb the *mana*gements made for the developement and improvement of the property and would decrease the value of its stock and of the rights of the petitioner and of other bondholders to membership therein.

And the complainants further contend that as matter of law, the petitioner cannot maintain his said petition and is not entitled to the relief therein sought, and pray the judgment of this court thereon, and that they may have the same benefits thereof as if they had demurred to said petition.

ELISHA ATKINS.
SAMUEL H. GOOKIN.
C. W. HUNTINGTON.

DIST. OF MASS., *ss:*

On the 7th day of April, 1875, personally appeared the above Elisha Atkins and Samuel H. Gookin, and made oath that the foregoing statements were true so far as made upon their own knowledge, and so far as made upon information and belief that they had been informed and believed them to be true.

Before me.

WINSLOW WARREN,
Comm'r of U. S. C'rt C't.

81 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

On this 13th day of April, 1875, personally appeared C. W. Huntington, and made oath that the foregoing statement were true so far as made upon his own knowledge, and so far as made upon information and belief that he had been informed and believed them to be true.

Before me.

RALPH L. GOODRICH,
U. S. Com'r of Circ't Court, E. D. A.

Filed April 13, 1875.

RALPH L. GOODRICH, *Clerk.*

Circuit court of the United States, eastern district of Arkansas.

CHARLES W. HUNTINGTON, SAMUEL H. GOOKIN, and Elisha Atkins,
vs.
LITTLE ROCK AND FORT SMITH RAILROAD COMPANY.

C. W. HUNTINGTON & S. H. GOOKIN
vs.
SAME.

We, George O. Shattuck, F. M. Weld, and George Ripley, on oath, depose and say that we attended the sales decreed by this court for the foreclosure of the first and land-grant mortgages of the Little Rock and Fort Smith Railroad Company, as agents of holders of a majority of said bonds; a copy of the power of attorney given us by said bondholders is hereto annexed; that we also acted for some holders of 82 bonds and other claims on said company who did not sign said power; that no agreement whatever was made by us or either of us with the trustees or either of them under either of said mortgages at or prior to said sales in any way relating thereto; that at the sales and prior to purchasing the mortgaged property, we announced publicly that all holders of bonds would be allowed to come into any arrangement made for the improvement and management of the property if the same should be purchased by us upon the same terms with the bondholders whom we represented; that said road and the land grant were each sold to us as the highest bidders at said sale for the sum of fifty thousand dollars each; that we subsequently organized the Little Rock and Fort Smith Railway; that said new corporation was organized after much discussion and negotiation, and the claims of the different interests were recognized in good faith, so as to prevent litigation and secure the *corporation* of all parties in interest, to repair and extend the road and save the parts of the land grant from forfeiture; that the provisions for the exchange of bonds for stock in the new corporation were as favorable as it was practi'ble to secure for them and at the same time secure funds for the extension of the road.

And these deponents further say that said Huntington was appointed upon the committee to pass upon claims because he represented the bondholders.

GEO. O. SHATTUCK.
F. M. WELD.
GEORGE RIPLEY.

DIST. OF MASS., *ss:*

On this 6th day of April, 1875, personally appeared the above named George O. Shattuck, F. M. Weld, and George Ripley, and made oath that the foregoing affidavit by them subscribed was true.

Before me.

83 WINSLOW WARREN,
Comm'r of U. S. Cir't C't.

Filed April 13, '75.

RALPH L. GOODRICH, *Clerk.*

A.

Whereas the railroad and other property of the Little Rock and Fort Smith Railroad Company, and the land grant of said company, are advertised to be sold under foreclosure suits brought upon the two mortgages made by said company, on the tenth day of December next, and the subscribers, holders severally of the number of first-mortgage and land-grant bonds of said company set against their respective names, deem it for their interest to purchase said road and other property and said land grant at said sales or at such other time as they may be able:

Now, therefore, we hereby appoint George O. Shattuck, Francis M. Weld, and George Ripley our agents and trustees, with full powers—

First. To take such measures as they shall deem proper to secure for our benefit a title to the road, franchises, land grant, and other property to be sold under said mortgages, by purchases under said foreclosure sales or otherwise, at their discretion, and hold the same as trustees for us, with full power to manage and maintain the same, and to sell and convey the same, or cause the same to be sold and conveyed under
84 said foreclosure suits, to any corporation or corporations, or persons that may be authorized to take and hold the same; said trustees being hereby fully authorized to organize, or cause to be organized, a corporation for the purpose of holding and managing the property sold under said foreclosure sales, upon such basis as to stock and bonds as they may deem best; and to receive in payment therefor, to our use, either cash or stock or bonds of any corporation or corporations, or any other property, which they shall deem it for our interest to take.

Second. To sell, pledge, or use our said bonds, or any of them, or any of the proceeds, or any money or other things received on account of the same, to raise money to purchase or improve said railroad and other property, or to pay or compromise any claims either legal or equitable, at their discretion, which may be made upon or on account of said road or other property, or on account of the construction or repairs of the same.

Third. For the purpose of paying said agents for services and expenses, and for securing them against any loss by reason of the exercise of any of the powers conferred in the premises, and to enable them to exercise the powers herein conferred, and to do such other acts as they shall deem for our interests, we hereby severally assign, transfer, and convey to them our said bonds, with full power to use and dispose of them as fully as if they were their own property, in any manner and for any purpose which they shall deem for our advantage. And we severally hereby agree to pay on demand to said agents, for the purposes aforesaid, such sums of money, not exceeding in all five per cent. on the amount of the bonds set forth against our respective names, as shall from time to time be called for by them.

85 Fourth. Said agents are hereby authorize' such other powers, not herein specifically conferred, as they may deem for the best interests of all concerned, and to employ and pay such sub-agents, attorneys, and counsel as they shall deem proper to hold said bonds or exercise any power conferred by this instrument, and shall not be personally responsible for the neglect or default of said sub-agents, attorneys, or counsel; and each of our said agents is to be responsible only for his own neglect or default, and not for that of the others.

Fifth. Any two of our said agents may exercise all the powers herein conferred, and may fill any vacancy in their number caused by resignation or otherwise; and any person so appointed, in writing, to fill a vacancy, shall have the same power as if appointed and named in this instrument.

In witness whereof we have hereunto set our hands this twenty-first day of November, A. D. 1874.

Name and address.	Amt. first-mortgage bonds.	Amt. ld. gt. bds.

N. B.—The committee appointed at a meeting of the bondholders held on the 21st inst. have fixed upon December 1st, 1874, as the day on or before which each bondholder is to signify his assent to the foregoing plan by returning this agreement with his or their signatures affixed, to Ell. Adams, p. o. box 570, Boston, Mass.

86 CHARLES W. HUNTINGTON, SAMUEL H. Gookin, and Elisha Atkins, trustees,
vs. } 139.
THE LITTLE ROCK AND FORT SMITH RAILROAD Company et al.

On this day the petition of Charles H. Richardson, Frank Shaw, and David S. Greenough, praying that the decree of this court confirming the sale heretofore in this cause be modified by striking out the last clause of said decree, which provides that the Little Rock and Fort Smith Railway, the purchaser of said property, shall pay such claims against and liabilities of the Little Rock and Fort Smith Railroad Company as shall be approved by C. W. Huntington, George Ripley, and Henry A. Whitney, in one year, came on to be heard, and the court having heard said petition and the affidavits in support thereof, and against the same, and the arguments of counsel, and being advised in the premises, doth refuse to grant the prayer of the same or to modify the decree as prayed, but doth of its own motion order that said decree be modified and amended by adding to the last clause thereof, "subject to the approval of this court," which is done, and thereupon in open court the petitioners except to the decisions and judgment of the court in so refusing to grant the prayer of their said petition.

And thereupon, on the application of said petitioners, it is farther ordered that they and all other holders of the bonds issued by the Little Rock and Fort Smith Railroad Company, who have not yet expressed their assent to the action of the trustees and the decree of the 87 court by complying with the requirements and becoming stockholders in the Little Rock and Fort Smith Railway, have the farther time of sixty days from this date in which to elect whether they will become members of said Little Rock and Fort Smith Railway, or will take their proportional share of the moneys in court.

And it is further ordered that the approval of this court shall be obtained before the payment of any claim, and that twenty days' notice of the application for such approval shall be given to Charles H. Richardson, Frank Shaw, and David S. Greenough, or their solicitors, Messrs. Brown and Ford, and that they, the said Richardson, Shaw, and Greenough shall be allowed to appear and defend against such application and to introduce evidence, and to be heard in opposition to any claim.

It is agreed that subsequently to the amendment of the plaintiffs' bill of complaint in Oct., 1874, viz, during the week preceeding the October term of said circuit court, a hearing was had before Judge Dillon at Des Moines, Iowa, upon the application of the plaintiffs, Huntington and Gookin, for the appointment of receivers with power to issue debentures for the purpose of completing said railroad, in accordance with the prayer of said bill of complaint as amended; that the further hearing upon said application was postponed to await the action of the district judge upon the final hearing of said cause at the October term of said court, and said application was not again renewed.

C. W. HUNTINGTON,
For Appellees.
B. C. BROWN,
For Appellants.

88 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, eighth circuit, hereby certify that the foregoing writing annexed to this certificate are true, correct, and compared copies of the originals on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and the seal of this court this 11th day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first.

Attest:
[SEAL.] RALPH L. GOODRICH, *Clerk.*

(Indorsed:) D. S. Greenough et als. v. Little Rock & Fort Smith R. W. Co. et als.

(Indorsement on cover:) No. 160. Frank Shaw and David S. Greenough, jr., appellants, v. The Little Rock and Fort Smith Railway et al. E. Arkansas C. C. U. S. Filed 4 August, 1877.

○

IN THE SUPREME COURT OF THE UNITED STATES.

FRANK SHAW AND DAVID S. GREENOUGH,
Appellants,
159. vs.
THE LITTLE ROCK & FT. SMITH RAILWAY, et al.,
Appellees,

AND

SAME, Appellants,
160. vs.
SAME, Appellees.

BRIEF FOR APPELLANTS.

B. C. BROWN.

IN THE SUPREME COURT OF THE UNITED STATES.

FRANK SHAW AND DAVID S. GREENOUGH,
Appellants,
159. vs.
THE LITTLE ROCK & FT. SMITH RAILWAY, et al.,
Appellees,

AND

SAME, Appellants,
160. vs.
SAME, Appellees.

BRIEF FOR APPELLANTS.

B. C. BROWN.

IN THE

SUPREME COURT

OF THE UNITED STATES.

FRANK SHAW and DAVID S. GREENOUGH, Appellants,
159. vs.
THE LITTLE ROCK and FT. SMITH R. R. et al., Appellees.

and

SAME, Appellants,
160. vs.
SAME, Appellees.

These causes presenting the same facts and questions, counsel have agreed, with permission of the Court, that they be argued together.

By the act of Feb. 4, 1853 (*10 Stat. 155.*), Congress granted to the States of Missouri and Arkansas ten sections of land per mile, to aid in building a railroad from the Mississippi River, at the mouth of the Ohio, to the Texas boundary, with branches at Little Rock, Arkansas, to the Mississippi River and to Fort Smith. The lands thus given for construction of the branch to Fort Smith were granted by the State of Arkansas to the Little Rock and Fort Smith Railroad Company, by the Act of January 19, 1855 (*Pamphlet Acts, p. 169*). Afterward, the time limited by the final Act having expired, the grant was renewed by Congress directly to the Company, by the Act of July 28, 1866 (*14 Stat. 339*), and, afterward, time was further extended, by the Act of April 10, 1869 (*16 Stat. 46*). And by the Act of April 12, 1869 (*Pamphlet Acts, p. 160*), the Legislature of Arkansas again granted these lands to the Company.

On December 22, 1869, the Company conveyed its road, road-bed, and all appurtenances, to Henry W. Paine and Samuel T. Dana, in trust, to secure payment of its bonds, to amount of three million five hundred thousand dollars, all of which were afterward issued. This mortgage, for distinction, will be called the "Railroad Mortgage," although in the pleadings it is called the "First Mortgage."

On June 20, 1870, the Company conveyed the lands so granted to it to Henry W. Paine, Samuel T. Dana and William B. Stevens, in trust, to secure payment of five million dollars of other bonds, all of which were afterward issued. This is called the "Land Mortgage."

On May 12, 1874, several defaults in payments of interest having been made, two several bills of complaint were filed in the Circuit Court of the United States for the Eastern District of Arkansas—the one by Henry W. Paine, the remaining trustee (Dana having resigned), to foreclose the Railroad Mortgage; the other by Henry W. Paine, William B. Stevens and Charles W. Huntingdon (the last of whom had been appointed trustee instead of Dana, who had resigned), to foreclose the Land Mortgage.

Pending the proceedings, Paine and Stevens resigned. Samuel H. Gookin and C. W. Huntingdon were appointed trustees of the Railroad Mortgage, and Samuel H. Gookin and Elisha Atkins were appointed trustees of the Land Mortgage, in room of Paine and Stevens. Proper orders of substitution were made, and the causes proceeded in the names of Gookin and Huntingdon, complainants in the Railroad Mortgage case; and of Gookin, Atkins and Huntingdon, in the case of the Land Mortgage.

On October 3, 1874, in the Railroad Mortgage case, complainants amended their complaint, making many new allegations, and making Elisha Atkins, in his capacity of a trustee of the Land Mortgage, and in his individual capacity, and a number of other persons, all of Boston, Massachusetts, who, it was alleged, were "among the largest and principal holders" of the land grant bonds, defendants.

This amendment stated the execution of the Land Mortgage, the issue and sale of the bonds; and further stated (*p. p. 40 and 41*,) that one hundred miles of the road had been completed; "That the Secretary of the Interior of the United States has caused patents to be issued for the lands granted, as aforesaid, upon said one hundred miles of railroad already constructed, but the lands granted, as aforesaid, for the remaining sixty miles of said road, will revert to the United States, by the terms and conditions of said grant, unless said Company shall construct and complete, as a first-class railroad, an additional section of twenty miles of said road, on or before the thirteenth day of May, eighteen hundred and seventy-six, and the remaining twenty miles of said road, the same being the entire length thereof, on or before the twenty-eighth day of July, eighteen hundred and seventy-six." The amendment then stated that, in the opinion of competent persons, the 384,000 acres pertaining to the uncompleted portion were the most valuable part of the land grant, and that "the failure of said Company to comply with the terms and conditions of the grant will * * greatly impair the value of the bonds issued upon said lands, by depriving said bonds of the security of 384,000 acres of land, which they would otherwise have," etc. And further: "That said railroad, from Argenta to Clarksville, is practically no security for the bonds issued under said railroad mortgage to said Paine and Dana." And, after stating the estimated expense of completing the road, stated that, in the judgment of the new trustees, and of "men competent to form and express an opinion on such subjects," the railroad, if completed in time, would be a more valuable security for the bonds issued under the railroad mortgage, even though the cost of completion "should be a lien upon the entire length of said road prior to that created by said mortgage," and prayed "that a receiver might be appointed, with power to borrow money and complete the road, and that the debentures issued by him might be a lien upon said railroad already constructed, * * * and also to be a lien upon the lands that *may hereafter be acquired* under and by virtue of said land grant, such debentures to take precedence of the lien created by said railroad mortgage to said Paine and Dana upon said railroad heretofore constructed, and hereafter to be constructed, as well as of the lien created by said land mortgage to said Paine, Dana and Stevens, so far as the same relates to the lands *hereafter to be acquired* upon the construction of said sixty miles of railroad."

On October 17th all the new defendants entered their appearance.

The prayer for a receiver with power to issue debentures was not granted. No receiver was appointed, although special application was made to the Circuit Judge at Davenport, Iowa, after amendment and before decree.

On November 6th a decree was entered in each case. Each required payment of sums found due, and ordered sale on default. In the Railroad Mortgage case the decree took no notice of the matters suggested by the amendment from which quotations have been made.

No decree was rendered against Atkins as trustee of the Land Mortgage, nor against any other of the defendants brought in by the amendment. In both cases the decrees were simple decrees of foreclosure, in the usual form, each directing sale of the property conveyed by the mortgage presented in the case. Marriage, of the two properties, was not yet consummated, and the evidences of a pending courtship are but slight.

On December 19th the Master filed separate reports, showing separate sales, and that George O. Shattuck, Francis M. Weld and George Ripley had purchased both properties. Their bids were $50,000 for the property conveyed by the Railroad Mortgage—a like amount for the land. On the same day both sales were confirmed. And in these decrees of confirmation, for the first time, the true scheme of the trustees and managers is developed.

These decrees were so identical in form and substance that a citation of that in the land case will be all that is necessary.

The purchasers, Shattuck, Weld and Ripley, appeared in Court, and stated "that, as purchasers of the property mentioned and described in the decree rendered in the suit of Charles W. Huntingdon and Samuel H. Gookin, against the Little Rock and Fort Smith Railroad Company et als., numbered 138 from the docket of this Court, on the sixth day of November last past, they have organized a corporation * * * * * * * and that any holder of the bonds secured by the mortgage in this suit, as well as of the bonds secured by the mortgage foreclosed by the aforesaid suit, numbered 138, shall, upon the transfer of his bonds and his right to any of the proceeds of the railroad land grant, under the aforesaid decrees in said suits, numbered 138 and 139, within sixty days from date of such corporation (organization), unless further time be given by this Court, be entitled to his proportional interest in the stock of said new corporation, upon the same terms and stipulations as any other holder of said bonds; but this shall not prevent such new corporation from requiring from any and all holders of said bonds the payment of his proportion of the expenses attending such sales and purchases, *and of such other sums, not exceeding five per cent. of the principal of said bonds, as said corporation may deem it for its interests to require*, as a condition upon which said stock shall be delivered, provided that the same requirement shall be made of all the other holders of said bonds; and, provided further, that this stipulation shall not limit the power of the aforesaid Shattuck, Weld and Ripley to organize said corporation without notice, or of the corporation so organized *to mortgage its property*, and to preserve for its own use an amount of its capital stock not exceeding ten per cent. thereof. * * * * * * And the aforesaid Huntingdon, Gookin and Atkins, trustees, being severally personally present, state in open Court that they do not object, but consent to the confirmation of the sale held under and by virtue of the aforesaid decrees rendered in the suit, numbered 138, and that the title to the property sold under the aforesaid decree rendered in this suit snall become vested in said new corporation, under the name of the Little Rock and Fort Smith Railway, upon condition that the aforesaid stipulations, or the substance thereof, be embodied in the decree approving and confirming said sales."

The decree then proceeds to approve and confirm the sales, upon the stipulations above set out, directs conveyance to the corporation, and, in the Land Mortgage decree, adds the following condition: "But that said corporation shall, *as a part of the consideration* of such conveyance, compromise or pay such claims against the Little Rock and Fort Smith Railroad Company as C. W. Huntingdon, George Ripley and Henry A. Whitney may, within one year from the date hereof, approve, and upon such terms, and in such manner, as they may prescribe."

At the same time the purchasers, Shattuck, Weld and Ripley, filed in court their affidavit (*pp. 38, 39 and 40, No. 160*), that they purchased "on behalf of the persons whose names appear in the schedule hereto annexed." *Upon this list are the names of E. Atkins and S. H. Gookin. At the time Atkins was trustee of the land mortgage, Gookin was trustee of both.* That they were so interested in the purchase has never been denied, and is admitted by the demurrers to the bill of review. Atkins' name appears twice upon the list, and it is there shown that these two trustees held $866,000 of the railroad mortgage—$576,000 of the land mortgage. Their interest in the railroad mortgage, which, in their amended bill, they claim, was practically of little value, greatly exceeded their interest in the land mortgage, which was valuable. They owned nearly one-fourth of the railroad mortgage, but little over one-tenth of the land mortgage. The interest of the trustees so situated is manifest.

The purchase money amounted to $100,000. Various sums were paid out of this, and on May 14, 1875, the master reported the sum for distribution to be $18,878.90. Apportioned to the 5000 land bonds alone, this gives each bond three dollars and seventy-seven cents.

During all this time, the appellant, Greenough, was the owner of $64,000 land-grant bonds, and of $58,000 of railroad mortgage bonds, and Appellant Shaw was the owner of $48,000 land-grant and $11,000 railroad bonds.

On February 22, 1875, one Richardson petitioned the Court to amend the decree in the land-grant case, by striking out the clause last quoted, which required the new corporation, "as a part of the consideration," to pay certain debts of the old debtor company, and erected a tribunal unknown to the law to adjudicate claims presented and prescribe the terms of payment; and also asked that the time fixed for the bondholders to decide whether they should assent or not, be extended until the matter could be heard. In this petition it was alleged that one of the assenting trustees, Atkins, held claims against the debtor company which would be presented to this tribunal.

The Trustees appeared, filed answer, and resisted this petition. This answer, sworn to by Atkins, admits that he "does hold claims which may be referred to said referees, as provided by said decree;" thus admitting that this trustee had a double interest to be served by his consent to the confirmation of the sale upon the "stipulations" mentioned.

The court refused to grant the prayer of petition, or "to modify the decree as prayed, but doth, of its *own motion*, order that said decree be modified by adding to the last clause thereof, 'subject to the approval of the court;'" and further, without being asked, ordered that notice of the application for payment should be given petitioner and appellants, and they be allowed to defend, etc. If asking bread they were not given a stone, they were exceeding ten per cent. thereof. * * * * * * And the aforesaid Huntingdon, Gookin and Atkins, trustees, being severally personally present, state in open Court that they do not object, but consent to the confirmation of the sale held under and by virtue of the aforesaid decrees rendered in the suit, numbered 138, and that the title to the property sold under the aforesaid decree rendered in this suit shall become vested in said new corporation, under the name of the Little Rock and Fort Smith Railway, upon condition that the aforesaid stipulations, or the substance thereof, be embodied in the decree approving and confirming said sales."

The decree then proceeds to approve and confirm the sales, upon the stipulations above set out, directs conveyance to the corporation, and, in the Land Mortgage decree, adds the following condition: "But that said corporation shall, *as a part of the consideration* of such conveyance, compromise or pay such claims against the Little Rock and Fort Smith Railroad Company as C. W. Huntingdon, George Ripley and Henry A. Whitney may, within one year from the date hereof, approve, and upon such terms, and in such manner, as they may prescribe."

At the same time the purchasers, Shattuck, Weld and Ripley, filed in court their affidavit (*pp. 38, 39 and 40, No. 160*), that they purchased "on behalf of the persons whose names appear in the schedule hereto annexed." *Upon this list are the names of E. Atkins and S. H. Gookin. At the time Atkins was trustee of the land mortgage, Gookin was trustee of both.* That they were so interested in the purchase has never been denied, and is admitted by the demurrers to the bill of review. Atkins' name appears twice upon the list, and it is there shown that these two trustees held $866,000 of the railroad mortgage—$576,000 of the land mortgage. Their interest in the railroad mortgage, which, in their amended bill, they claim, was practically of little value, greatly exceeded their interest in the land mortgage, which was valuable. They owned nearly one-fourth of the railroad mortgage, but little over one-tenth of the land mortgage. The interest of the trustees so situated is manifest.

The purchase money amounted to $100,000. Various sums were paid out of this, and on May 14, 1875, the master reported the sum for distribution to be $18,878.90. Apportioned to the 5000 land bonds alone, this gives each bond three dollars and seventy-seven cents.

During all this time, the appellant, Greenough, was the owner of $64,000 land-grant bonds, and of $58,000 of railroad mortgage bonds, and Appellant Shaw was the owner of $48,000 land-grant and $11,000 railroad bonds.

On February 22, 1875, one Richardson petitioned the Court to amend the decree in the land-grant case, by striking out the clause last quoted, which required the new corporation, "as a part of the consideration," to pay certain debts of the old debtor company, and erected a tribunal unknown to the law to adjudicate claims presented and prescribe the terms of payment; and also asked that the time fixed for the bondholders to decide whether they should assent or not, be extended until the matter could be heard. In this petition it was alleged that one of the assenting trustees, Atkins, held claims against the debtor company which would be presented to this tribunal.

The Trustees appeared, filed answer, and resisted this petition. This answer, sworn to by Atkins, admits that he "does hold claims which may be referred to said referees, as provided by said decree;" thus admitting that this trustee had a double interest to be served by his consent to the confirmation of the sale upon the "stipulations" mentioned.

The court refused to grant the prayer of petition, or "to modify the decree as prayed, but doth, of its *own motion*, order that said decree be modified by adding to the last clause thereof, 'subject to the approval of the court;'" and further, without being asked, ordered that notice of the application for payment should be given petitioner and appellants, and they be allowed to defend, etc. If asking bread they were not given a stone, they were given something as worthless. For, as the claims which were to be presented were an unknown quantity, they could not avail themselves of the gracious permission given, without burdening themselves with fees and costs to an unknown amount.

On July 6, 1875, appellants Shaw and Greenough filed in court their several bills of review of the decrees of foreclosure and confirmation, pointing out in each case eleven specific errors. Demurrers were interposed to these bills by the railway company and the trustees, which, on argument, were sustained. The complainants declining to amend, their bills of review were dismissed, and they appealed to this Court.

It would be unnecessary labor to endeavor to argue all the exceptions made to the decrees by the bills of review, and I shall leave many of them to speak for themselves, simply remarking that all are founded in fact, as an examination of the record will show.

This case is a hard one to argue. Direct authority can not be cited, for the reason that none exists. The history of the law affords no parallel to this case. I am justified in saying this, not only by my own research, but by the fact that, during the years that this litigation has been pending, the very able opposing counsel have never cited a case sustaining the action had.

Our case is simply this: The $5,000,000 land bonds, at the time the original bills were filed, were secured by the 640,000 acres of land, before then earned by, patented to, and owned by, the company. Valuing these lands at the minimum price fixed by government upon lands within railroad reservations, $2.50 per acre, they were worth $1,500,000. They were undoutedly worth much more, as is admitted by the demurrer to the bill of review; but at this price the security was worth thirty per cent. of the face of the bonds; or, in other words, each bond was worth three hundred dollars. Appellants owned 112 of these bonds, **worth $33,600.**

The railroad mortgage bonds, 3500 in number, were secured upon one hundred miles of completed road. What was its value is unknown; but if each mile was only worth $7000, that made the bonds worth $200 each. It is admitted by the demurrer that this is not an unreasonable valuation. Of these bonds appellants owned 59, worth $10,800.

The appellants have made no contracts; no judgment has been rendered against them. Yet, without their assent these bonds, their property, or what is the same thing, the security which gave the bonds value, has been taken from them and given to another. In exchange it is said to them, take something for which you never contracted—stock in an enterprise in which you never embarked—or take $3.77 for each of your bonds; $689.91 for your property worth $44,000.

It may be this is right. It may be we are wrong. It may be that such property is not protected by our laws. It may be that minorities of bondholders have no rights which majorities are bound to respect. But if these things be so, we hope here to be told why they are so. For, in the progress of these causes, never yet, by court or counsel, has been annonnced one principle of law or equity which justified the action had; never yet has been cited one authority which sustained it.

Time was when courts said that even legislatures could not take the property of one citizen and give it to another. Here majorities, purchasers and trustees, have taken appellant's property and given it to themselves.

In Clearwater vs. Meredith (*1 Wal. 25, 41*), speaking of a subscriber to the stock of a corporation, this Court said: "If a majority of the stockholders of the corporation of which he was a member had undertaken to transfer his interest against his wish they would have been enjoined. There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company." Yet what the

Court here said there was no power to do in our case has been done, and, so far, effectually done. And our case is as much stronger than Clearwater's as it is possible to imagine. Clearwater had embarked in the enterprise of building and operating a railroad; appellants had not. Clearwater had a community of enterprise or object with his co-stockholders. In our case there was nothing but a community of interest in a common security.

In Jackson vs. Luddleing (*21 Wal, 622*), this Court said: "When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to others. Community of interest involves mutual obligation."

In that case the principles enunciated protected a majority against the wrongful combination of a minority? Will it not equally protect a minority from the wrongful combination of a majority?

But the whole wrong done has not yet been shown. Not only was it attempted to force appellants to surrender their security—their property—and to accept something else in lieu, but they were required to pay for the privilege. It was especially stipulated that the new company might demand from each bondholder payment of a portion of the expense incurred by the trustees in depriving him of his property, and a sum equal to five per cent. of the face of his bonds. Could a more perfect scheme to compel men to part with their property; to let the rich swallow the poor, be devised?

Appellants held bonds of the face value of $183,000. Five per cent. of this is $9,150, the sum for which, if they assented, they obligated themselves. It may be said that this sum was never demanded. Whether it was or not, I know not. But they were required to assent to the scheme as a whole, to surrender their property, and burden themselves with this obligation, or—

take the pittance which the liberality of the majority and the good management of the trustees had provided for them.

But the matter did not stop here. In addition, they must agree that the assets of the new company, whose stock they were required to take for their property, might be diverted to an unknown amount to the payment of the debts of the old Little Rock and Fort Smith Railroad Company, their debtor. They held a first lien upon the 640,000 acres. This must be waived, that favored creditors of the debtor company might be paid. Against this they respectfully petitioned, and were treated with contempt.

In Vose vs. Brunson (*6 Wall, 452*). Vose asked for exactly what was given in this case, and, in addition, showed that there was room in the mortgage to satisfy his equity. Yet this Court said: "To do this there must be a power somewhere to enlarge the mortgage. And where is it lodged? Certainly not with the trustees, for their *duty* is to see that the security held by them for their *cestui que trusts* is enforced *according to the terms of the deed*. They could neither enlarge the mortgage, *nor consent to its enlargement*. The Court could not do it, nor the LaCrosse Company," etc.

In the teeth of this, in our case, the trustees and Court together did what, if this Court be right, either or both could not do.

Two other of the terms of the "stipulation" remain to be noticed. It was not to interfere with the new corporation retaining ten per cent. of its stock for its own use, nor with its mortgaging its property. The first farther enlarged the mortgage; the second rendered the stock offered of less value to the amount of an unknown mortgage. The option given appellants was: Surrender your land bonds and their security (worth $33,000), your railroad bonds (worth $10,000), and take stock in an enterprise in which you never embarked; consent that the stock which we kindly give you may be reduced in value by the assets contributed by you being diverted to payment of debts you do not owe; that it may be further reduced by ten per cent. being taken for some unexplained purpose; that it may be further reduced an unknown amount by a mortgage, and pay $9,000 for the privilege; or for your refusal, pay a penalty of $40,000. I say a "penalty" advisedly, for the option was: take this, or take less than $700.

One other matter: More was given than was asked by the bill. I have quoted the prayer in full. As to the land, it was only asked that the Court might charge that "hereafter to be acquired," with the expense of completing the road. If there then existed the intent to take the 640,000 acres which had been before acquired by the company, and which then, in equity, belonged to the bondholders, it was carefully concealed, and this concealment continued until decrees confirming the sales were spread upon the records. The pound of flesh was given without demand.

Meaning no disrespect to the Court below, I classify these decrees as the decrees of the trustees. Assuredly they would not have been entered if they had not consented. The error of the Court was in allowing them to so consent. The affidavits of the purchasers were sworn to and filed on December 19; the decrees were entered same day. This haste shows that the matter of the decrees could not have had that consideration which is indicative of judicial action, and that the decrees were only entered because assented to by the trustees. But let that be as it may, neither the Court nor the trustees, nor both acting together, had power to take appellant's property, to fix a price upon it, nor to give it to another without their consent. Neither had jurisdiction to marry the two properties, to require a holder of either to exchange for the other, or to give a part of one as the price for the other. The seventh, eighth, ninth, and tenth exceptions specified in the bills of review are an attempt to clothe the matters hereinbefore mentioned in language. If, through the poverty of my vocabulary I have not expressed them clearly, this Court, seeing the case, will not allow a just cause to fail because poorly presented by counsel.

It would be unjust to the trustees if I did not give their reason for their action, as I gather it from the papers. It was necessary, they said, in order to save the property for the bondholder. Certainly an unique way of saving it, to take it from him and give it to another. There may be propriety in asking to be saved from such salvors.

I have no words of abuse for these trustees. Preferring to let the transaction speak for itself, I do not even charge them with fraudulent intent. It is probable that they believed they were doing the best possible for their beneficiaries. Be this as it may, the audacity with which they formed the plan, and the indifference they have exhibited toward those of their beneficiaries who chanced to differ with them, is worthy of all admiration. If they succeed in getting the endorsement of this Court, they may reasonably expect employment as salvors of many other wrecks.

The other important point upon which I propose to rest this case is, that two of the trustees, Gookin and Atkins, were interested as purchasers. As I have before noticed, the record shows that their interests as purchasers were large; that it was to their interest to absorb the land for the benefit of the railroad mortgage, and that Atkins had another large interest as creditor of the debtor company, of which demand he expected payment under the decree. Neither resigned his trusteeship before purchasing; neither pointed out his interest to the Court and obtained leave to purchase. A disinterested trustee, in whose name the proceedings commenced, resigned before decree, and these interested gentlemen accepted the trusteeship and with it all its duties, one of which was to see that the security held by them for their *cestui que* trust was enforced, "according to the terms of the deed."

If trustees can so alter the terms of the deed; if they can do what in this case they have done, it is best that the fact should be known. "The doctrine contended for would utterly destroy the marketable value of the corporate securities. No prudent man would ever buy a bond in the market, if the provisions made for its ultimate redemption could be altered without his consent."

Vose vs. Bronson (*6 Wal. 456*).

The trustees had no power to consent to confirmation of a sale in which they were interested as purchasers or otherwise; and that their consent has been entered of record by a court gives it no additional force or validity. It is still their consent and nothing else. I shall not cite to this Court authorities for this proposition.

Before closing this brief, I must notice the only objections to the relief sought by appellants which I have ever heard.

1. They have been called "captious." If so, it is the captiousness of men who decline to allow others to dictate to them the terms upon which they shall part with their own. So long as the right of property is respected, the law must sustain the right of every one to fix his own price upon his own property.

2. It is said that their interest is too small for consideration. It is true their interest is not so large as was that of the gentlemen who assumed to act as their trustees; and if this proceeding is sustained, they may well wish it had been smaller. Small as it is, however, it is their own, and there is no power which can take it from them without their consent.

3. They came too late. As before pointed, the bills were drawn to conceal the scheme until it culminated in the decrees of confirmation. They knew and could know nothing of it until the terms of the decree could be communicated to them at their distant home. And they filed their bills to review the decrees within seven months after they were rendered.

Thomas vs. Brockenborough (*13 Wh., 146*).

4. It is said that, by applying for further time to consider the proposition submitted to them, and to decide whether to accede or not, appellants have estopped themselves. An examination of the petition and answer thereto will show that it was the petition of one Richardson, although appellants' names improperly appear therein. They neither signed nor verified it, and their names are not noticed in the answer of the trustees. But, even if appellants had made such application, it could not have operated to estop them from declining and taking their course afterward. To give it such an effect would make the provision usual, in such decrees, empowering the Court to extend time a judicial snare. If asking time for consideration means assent, a new principle is introduced into the law of contracts.

There are other errors shown by the record, and pointed out by the bills of review, which will commend themselves to the attention of the Court; but, fearing to make this brief anything but brief, I will pass them over in silence, and submit these causes upon the matters suggested.

Respectfully, B. C. Brown,
For Appellants.

Supreme Court of the United States.

No. 159.

FRANK SHAW AND DAVID S. GREENOUGH,

APPELLANTS,

v.

THE LITTLE ROCK AND FORT SMITH RAILWAY ET ALS.

No. 160.

SAME, APPELLANTS, *v.* SAME.

BRIEF FOR RESPONDENTS.

C. W. HUNTINGTON, *of Counsel.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1880.

Supreme Court of the United States.

No. 159.

FRANK SHAW AND DAVID S. GREENOUGH,
APPELLANTS,

v.

THE LITTLE ROCK AND FORT SMITH RAILWAY
ET ALS.

No. 160.

SAME, APPELLANTS, *v.* SAME.

BRIEF FOR RESPONDENTS.

C. W. HUNTINGTON, *of Counsel.*

BOSTON:
ALFRED MUDGE & SON, LAW PRINTERS, 34 SCHOOL STREET.
1880.

Supreme Court of the United States,

Nos. 159 and 160.

FRANK SHAW ET AL., *Appellants*,

v.

THE LITTLE ROCK AND FORT SMITH RAILWAY ET ALS.

The plaintiffs and appellants, holders of certain railroad, and also of certain land-grant bonds issued by the Little Rock and Fort Smith Railroad Company, and secured by two independent mortgages executed upon said railroad and land grant respectively, seek by their so-called bills of review to reverse and set aside the decrees of foreclosure and sale rendered by the Circuit Court of the United States for the Eastern District of Arkansas on the 6th day of November, 1874; also the decrees of said court confirming said sales, rendered on the nineteenth day of December, 1874, in two foreclosure suits then pending in said court and instituted by the respective trustees under said mortgage deeds.

The assignments of error are substantially the same in each of the above entitled bills of review; and as the facts upon which said assignments of error are based are the same in each of said suits, by agreement of counsel and with the permission of the Court, the two cases are to be treated and argued as one and the same suit.

The records of the proceedings in said original foreclosure suits disclose the following

STATEMENT OF FACTS.

The Little Rock and Fort Smith Railroad Company was organized in the year 1855 under a special charter, granted by the General

Assembly of the State of Arkansas Jan. 22, 1855. Said State also transferred to said corporation a grant of lands which had previously been made by the Congress of the United States to said State, to aid in the construction of a railroad from Little Rock to Fort Smith, by an act approved Feb. 19, 1853. This grant was afterwards revived and enlarged from six sections to ten sections per mile by an act of Congress approved July 28, 1866. In the beginning of the year 1870, no part of said road had been completed, and by an act of Congress approved March 8, 1870, the time for completing the first section of twenty miles was extended to the thirteenth day of May, 1870.

On the twenty-second day of December, 1869, said corporation executed to Henry W. Paine and Samuel T. Dana a mortgage deed or deed of trust upon the railroad to be constructed and its rolling-stock, buildings and right of way, but not upon the lands granted as aforesaid, to secure the payment of certain bonds which said company proposed to issue, amounting in the aggregate to $3,500,000, the principal of which was payable Jan. 1, 1900, with interest coupons at the rate of six per cent per annum, payable semi-annually, principal and interest payable in gold coin of the United States. A copy of this mortgage is set forth on pages 23 to 31 of the printed transcript in suit No. 159.

On the twentieth day of June, 1870, said railroad company executed a mortgage deed, or deed of trust, upon the lands granted by the Congress of the United States, as aforesaid, to the said Paine and Dana and to William B. Stevens, as trustees, to secure the payment of certain bonds which said company proposed to issue, amounting in the aggregate to $5,000,000, payable April 1, 1900, in lawful money of the United States, with interest coupons at the rate of seven per centum per annum, payable semi-annually, in like lawful money. A copy of this mortgage is set forth on pages 17 to 25 of the printed transcript in suit No. 160.

The bill to foreclose the said railroad mortgage was filed May 12, 1874, and a copy of the same is set forth on pages 12 to 23 of the printed transcript in suit No. 159.

The bill of complaint, after setting forth the execution of said mortgage, etc., alleged, among other matters, that said company had from time to time issued the entire amount of $3,500,000 in bonds authorized by said mortgage; that the company had defaulted upon all the coupons attached to said bonds and which were payable from Jan. 1, 1871, to Jan. 1, 1874, both inclusive; that only one hundred miles of said road had been built out of one hundred and sixty miles, the entire length of said road; that all the bonds authorized to be issued under said land-grant mortgage had been issued; that said corporation was, and for a long time had been, notoriously and hopelessly insolvent, its bonds possessing only a nominal value in the market, its earnings insufficient to pay operating expenses and to keep the road bed and rolling-stock in repair, and that the trustees, by virtue of the power conferred upon them in said mortgage deed, more particularly by Articles 4 and 7 thereof, had elected to declare the principal of all the bonds issued under the same immediately due and payable.

The bill also alleged in paragraphs numbered "6," "7" (pages 17 to 20 of the printed transcript in No. 159), that prior to the execution of the said mortgage deed to the said Paine and Dana, the Board of Railroad Commissioners of said State, upon the application of said company, had awarded to said company the bonds of said State to be issued in aid of railroads to the extent of $10,000 per mile for each mile of completed road, payable in thirty years, with interest coupons at the rate of seven per centum per annum, payable semi-annually, which coupons were payable on the first days of April and October in each year, and in order to provide for the payment of said coupons said company was required by law to pay into the treasury of said State, on or before the twentieth days of June and December in each year, the amount of the coupons payable the following October and April respectively, in default of which it was made the duty of the Pulaski Chancery Court, upon the application of the treasurer of said State, to issue a writ of sequestration and to appoint a receiver with authority to demand and receive all the income and revenues of such defaulting company until all sums in arrears had been paid, with the costs of sequestration proceedings.

The bill alleged that said State of Arkansas had issued to said company $1,000,000 in its said State-aid bonds upon said one hundred miles of completed road; that said company had failed to pay

Assembly of the State of Arkansas Jan. 22, 1855. Said State also transferred to said corporation a grant of lands which had previously been made by the Congress of the United States to said State, to aid in the construction of a railroad from Little Rock to Fort Smith, by an act approved Feb. 19, 1853. This grant was afterwards revived and enlarged from six sections to ten sections per mile by an act of Congress approved July 28, 1866. In the beginning of the year 1870, no part of said road had been completed, and by an act of Congress approved March 8, 1870, the time for completing the first section of twenty miles was extended to the thirteenth day of May, 1870.

On the twenty-second day of December, 1869, said corporation executed to Henry W. Paine and Samuel T. Dana a mortgage deed or deed of trust upon the railroad to be constructed and its rolling-stock, buildings and right of way, but not upon the lands granted as aforesaid, to secure the payment of certain bonds which said company proposed to issue, amounting in the aggregate to $3,500,000, the principal of which was payable Jan. 1, 1900, with interest coupons at the rate of six per cent per annum, payable semi-annually, principal and interest payable in gold coin of the United States. A copy of this mortgage is set forth on pages 23 to 31 of the printed transcript in suit No. 159.

On the twentieth day of June, 1870, said railroad company executed a mortgage deed, or deed of trust, upon the lands granted by the Congress of the United States, as aforesaid, to the said Paine and Dana and to William B. Stevens, as trustees, to secure the payment of certain bonds which said company proposed to issue, amounting in the aggregate to $5,000,000, payable April 1, 1900, in lawful money of the United States, with interest coupons at the rate of seven per centum per annum, payable semi-annually, in like lawful money. A copy of this mortgage is set forth on pages 17 to 25 of the printed transcript in suit No. 160.

The bill to foreclose the said railroad mortgage was filed May 12, 1874, and a copy of the same is set forth on pages 12 to 23 of the printed transcript in suit No. 159.

The bill of complaint, after setting forth the execution of said mortgage, etc., alleged, among other matters, that said company had from time to time issued the entire amount of $3,500,000 in bonds authorized by said mortgage; that the company had defaulted upon all the coupons attached to said bonds and which were payable from Jan. 1, 1871, to Jan. 1, 1874, both inclusive; that only one hundred miles of said road had been built out of one hundred and sixty miles, the entire length of said road; that all the bonds authorized to be issued under said land-grant mortgage had been issued; that said corporation was, and for a long time had been, notoriously and hopelessly insolvent, its bonds possessing only a nominal value in the market, its earnings insufficient to pay operating expenses and to keep the road bed and rolling-stock in repair, and that the trustees, by virtue of the power conferred upon them in said mortgage deed, more particularly by Articles 4 and 7 thereof, had elected to declare the principal of all the bonds issued under the same immediately due and payable.

The bill also alleged in paragraphs numbered "6," "7" (pages 17 to 20 of the printed transcript in No. 159), that prior to the execution of the said mortgage deed to the said Paine and Dana, the Board of Railroad Commissioners of said State, upon the application of said company, had awarded to said company the bonds of said State to be issued in aid of railroads to the extent of $10,000 per mile for each mile of completed road, payable in thirty years, with interest coupons at the rate of seven per centum per annum, payable semi-annually, which coupons were payable on the first days of April and October in each year, and in order to provide for the payment of said coupons said company was required by law to pay into the treasury of said State, on or before the twentieth days of June and December in each year, the amount of the coupons payable the following October and April respectively, in default of which it was made the duty of the Pulaski Chancery Court, upon the application of the treasurer of said State, to issue a writ of sequestration and to appoint a receiver with authority to demand and receive all the income and revenues of such defaulting company until all sums in arrears had been paid, with the costs of sequestration proceedings.

The bill alleged that said State of Arkansas had issued to said company $1,000,000 in its said State-aid bonds upon said one hundred miles of completed road; that said company had failed to pay to said State the tax or interest upon the bonds thus issued, and that it was still indebted to said State for all the coupons attached to said bonds and payable from Oct. 1, 1870, to April 1, 1874, both inclusive; that, upon the application of the treasurer of said State, a writ of sequestration had issued from the Pulaski Chancery Court, and a receiver had been appointed for the purposes aforesaid, and that he was then acting as such receiver.

The bill was amended May 26, 1874, by the allegation that on the twenty-first day of said May the order of said Chancery Court appointing such receiver had been revoked and set aside.

The prayer of the bill is that the railroad and properties mentioned and described in said deed of mortgage may be sold subject to the lien of the State of Arkansas, if any such lien exists prior to that created by said mortgage; that the proceeds of such sale may be paid into court to await its final order and direction; that a receiver or receivers be appointed to take possession of and to operate said road with authority to borrow money and to issue debentures to repair and complete said road so that the land grant may not become subject to forfeiture, and that all persons claiming under said company may be absolutely barred and foreclosed of all equity of redemption in said mortgaged premises and for general relief.

The bill to foreclose the land-grant mortgage was filed May 26 1874, and a copy of the same is set forth on pages 10 to 17 of the printed transcript in suit No. 160.

The bill of complaint, after setting forth the execution of said mortgage, etc., alleged that the entire amount of $5,000,000 bonds authorized under said mortgage had been issued, and that said company had failed to pay the interest coupons upon said bonds, payable from April 1, 1871, to April 1, 1874, both inclusive. The bill also contained allegations in regard to the utter insolvency of the company, its inability to raise money to complete its road, etc., etc., similar to those above set forth as contained in the bill to foreclose the railroad mortgage, and also alleged that the trustees, by virtue of the power conferred upon them in Article 8 of said mortgage, had elected to declare the principal of all the bonds issued under said mortgage to be immediately due and payable.

The prayer of the bill is that the lands granted to said company, by said acts of Congress and of the General Assembly of said State, may, so far as the company is entitled to the same, be sold, and all the right, title and interest of the company therein; that the proceeds of such sales may be paid into court to await its order and direction, and that all persons claiming by, through or under said company may be absolutely barred and foreclosed of all equity of redemption in the premises, and for general relief.

Each of said original bills of complaint made all known judgment creditors of said company parties defendants, a few of whom entered their appearance and filed demurrers or answers.

The original trustees under each and both of said mortgage deeds resigned, and other persons were duly appointed in their stead and admitted as parties plaintiff in the prosecution of said suits.

Decrees *pro confesso* against said company were rendered in both suits at August rules, 1874.

On the third day of October, 1875, the plaintiffs in the suit to foreclose the railroad mortgage presented their petitions to the Court, asking leave to withdraw the replications theretofore filed by them to the answers of such defendants as had answered, and also to amend their bill of complaint by joining, as parties defendant thereto, the only one of the trustees under said land mortgage who was not also a trustee under the railroad mortgage, together with several of the principal holders of the bonds issued under each and both of said mortgage deeds. Said plaintiffs at the same time made formal application to the Court for the appointment of receivers, and set forth fully, by way of amendment to the fifth paragraph of their original bill, the reasons and necessity for such appointment.

The hearing upon this application was had before Judge Dillon at Des Moines, and the only reference thereto contained in the record is as follows, viz.: "It is agreed that subsequently to the amendment of the plaintiffs' bill of complaint, in October, 1874, viz., during the week preceding the October term of said Circuit Court, a hearing was had before Judge Dillon, at Des Moines, Iowa, upon the application of the plaintiffs, Huntington and Gookin, for the appointment of receivers, with power to issue debentures for the purpose of completing said railroad in accordance with the prayer of said bill of complaint as amended. That the further hearing upon said application was postponed to await the action of the district judge upon the final hearing of said cause, at the October term of said court, and said application was not again renewed."

See page 50 in No. 160.

The principal and controlling cause for the application for the appointment of receivers was the fact that by the terms of the land grant the company was required to complete a section of twenty miles of its road beyond the one hundred miles already completed before the thirteenth day of May, 1875, and about forty-eight miles additional before July 28, 1876, and a large majority of the principal bondholders feared that foreclosures and sales of the railroad and land grant could not be had in season to permit the purchasers at such sales to organize a new corporation, and to raise the moneys necessary to complete said twenty miles within the time fixed by the grant, and that the remainder of the land grant would consequently become forfeited. The action of the learned district judge in fixing an early day for the redemption of the mortgaged premises, and in default thereof, for the sales, obviated the necessity for the appointment of receivers, or for renewing the application for such appointment.

The October term of the Circuit Court of the United States for the Eastern District of Arkansas began on the twenty-sixth day of October, 1874. On the thirty-first day of said October the plaintiffs in said foreclosure suits filed their motions for decrees *pro confesso* against certain defendants, judgment creditors, who had failed to appear, and for a hearing at an early day as to the said company and other defendants, assigning among the causes for such early hearing the utter insolvency of the company and the danger of a forfeiture of the land grant should protracted delays be allowed.

Nov. 3 was fixed as the day for hearing said suits, and on that day the said company and certain judgment creditors, defendants, appeared and moved to have the decrees *pro confesso* theretofore severally rendered against them set aside. Arguments were had upon said motions as well as upon the demurrers and answers filed by other defendants, and on the sixth day of said November decrees of foreclosure and sale were rendered in each of said suits.

A copy of the decree in the railroad mortgage foreclosure suit is set forth in full on pages 44 to 46 of the printed transcript in suit No. 159, and a copy of the decree in the land-grant mortgage suit is set forth in full on pages 34 to 36 of the printed transcript in suit No. 160.

It is sufficient to state here that the decree in the railroad mortgage suit found that the said mortgage had been regularly executed for the purposes set forth in the bill of complaint; that the whole amount of $3,500,000 in bonds had been issued, and that the whole amount of said bonds with the interest thereon was due and unpaid. It was ordered that " unless the said defendants, or some of them, shall pay or cause to be paid to the plaintiffs on or before the tenth day of December next the aforesaid sum of $3,500,000 as a principal, together with all the interest which may be then due thereon, with the costs of this suit, the said mortgage shall be foreclosed, and that the said defendants, and each of them, shall thenceforth be barred from all equity of redemption under the said mortgage, and that all and singular the mortgaged premises mentioned in the said bill and the exhibits thereto annexed, to wit" (here follows a description of the property as set forth in the mortgage deed), " be sold together in one parcel, and that Charles P. Redmond, of Little Rock, in said State of Arkansas, be and hereby is appointed special commissioner to execute the above order of sale, and that such sale be by public auction, at the door of the court house of the Circuit Court of the United States for the Eastern District of Arkansas, on Thursday, the tenth day of December next, eighteen hundred and seventy-four, at ten o'clock in the forenoon," etc., etc. Said commissioner was required to publish notices of said sales three times a week for three successive weeks in newspapers published in New York City, Boston, Chicago and St. Louis, also in Little Rock, fully describing the property to be sold as fully as it was described in said decree. The terms and conditions of sale were also set forth by said decree, but as they form no part of the assignment of errors they need not be repeated here.

The decree rendered on said sixth day of November, 1874, in the land-grant mortgage-foreclosure suit was similar in all the above particulars, *mutatis mutandis*, to the aforesaid decree rendered in said railroad-mortgage foreclosure suit, and in addition provided that certain judgment creditors by name defendants "and any of the other defendants holding judgments against the said railroad company shall have leave to present their claims against the fund to be derived from said sale at any time within thirty days from this date, and shall be entitled to litigate their said claims against said fund the same as they might have done against said property, if this sale had not been decreed. And it is ordered and decreed that the purchaser at said sale deposit with the said commissioner at least fifty thousand dollars in United States currency or United States bonds to await the event of said litigation."

The next important fact, chronologically, to be mentioned in connection with the assignment of errors in these bills of review and disclosed by the record, is that a meeting of the holders of both classes of the bonds issued under both of said mortgages was held at Boston on the twenty-first day of said November, at which a committee of three was appointed to purchase said railroad and land grant at the aforesaid foreclosure sales to be held on the tenth day of December. The powers of said committee were derived from agreements signed by individual bondholders, a copy of which is set forth on pages 48 and 49 of the printed transcript in the suit No. 160, under the heading "A."

Pursuant to the powers conferred by said agreements the committee therein named attended the sales of the railroad and land grant held on said tenth day of December and became the purchasers at each and both of said sales. It appears from the affidavit of said purchasing committee and the schedule thereto annexed, a copy of both of which is set forth in full on pages 38, 39 and 40 of said printed transcript in suit No. 160, that said committee, in making said purchases, represented and acted as the agents of holders of said bonds to the aggregate value of upwards of $6,000,000. This amount was subsequently increased, as will be seen hereafter, to about $8,000,000 in bonds held by one hundred and eighty different individuals, out of a possible aggregate of $8,500,000 in bonds.

On the nineteenth day of said December the special commissioner, who was appointed on the sixth day of November to make said sales, submitted to the court a report of his acts and doings under the decrees of sale rendered in each of said foreclosure suits, and said sales were, after due consideration and deliberation, approved and confirmed by the learned district judge.

The decree of confirmation in the railroad mortgage foreclosure suit, after reciting the filing and submission of said report of said special commissioner, proceeds as follows, viz.: "And George O. Shattuck, Francis M. Weld and George Ripley, the purchasers of the property sold under said decree, being severally personally present, declare and state in open court, and desire the same to be entered of record, that it is their intention, immediately upon the confirmation by this court of the aforesaid sale, to organize a corporation under an act of the General Assembly of the State of Arkansas, approved Dec. 9, 1874, entitled, "An Act supplementary to an act entitled An Act to provide for a General System of Railroad Incorporation," approved July 23, 1868, which corporation shall own, hold and manage the property conveyed or to be conveyed under the aforesaid sale, as well as the lands and property conveyed or to be conveyed under the sale held by virtue of the decree rendered on the sixth day of November last past, in the suit of Charles W. Huntington, Samuel H. Gookin and Elisha Atkins, trustees, *v.* The Little Rock and Fort Smith Railroad Company *et als.*, No. 139 upon the docket of this court, and that any holder of the bonds secured by the mortgage foreclosed by this suit, as well as of the bonds secured by the mortgage foreclosed by the aforesaid suit, numbered one hundred and thirty-nine, shall upon the transfer of his bonds and his right to any of the proceeds of the sales of the railroad or land grant, under the aforesaid decrees in said suits, numbered one hundred and thirty-eight and one hundred and thirty-nine, within sixty days from the date of such organization, unless further time shall be given by the court, be entitled to his proportional interest in the stock of said new corporation, upon the same terms and stipulations as any other holder of said bonds; but this shall not prevent such new corporation from requiring from any and all holders of said bonds the payment of his proportion of the expenses attending said sales and purchases, and such other sums not exceeding five per cent on the principal of said bonds as said corporation may deem it for its interest to require, as a condition upon which said stock shall be delivered, provided that the same requirement be made of all the other holders of said bonds, and provided further, that this stipulation shall not limit the power of the aforesaid Shattuck, Weld and Ripley to organize said corporation without notice, or of the corporation so organized to mortgage its property or to reserve for its own use an amount of its capital stock not exceeding ten per cent.

"And the aforesaid Huntington, Gookin and Atkins, trustees, being severally personally present, state in open court that they do not object but consent to the confirmation of the sales held under and by virtue of the aforesaid decrees rendered in this suit and in the suit numbered one hundred and thirty-nine, upon the agreement that the aforesaid stipulations or the substance thereof be embodied in the decrees approving and confirming said sales." Then follows the decree that the aforesaid sale " be, and the same is hereby approved, ratified and cofirmed upon the stipulation that the said Shattuck, Weld and Ripley immediately proceed to organize a corporation under" the aforesaid act, " which said corporation shall have, hold and manage the property conveyed under the aforesaid sale," and in all other respects comply with all the other stipulations before recited which are repeated in the decree and set forth in full.

The decree of confirmation in the land-grant mortgage-foreclosure suit is similar to the decree above set forth, except that said purchasing committee stated in open court that they, as such purchasers, had organized the corporation referred to by the name of the Little Rock and Fort Smith Railway, and requested that an order be entered in said cause, directing said special commissioner to convey to such new corporation all the right, title and interest which said purchasers acquired by reason of the aforesaid purchase, under the aforesaid order of sale rendered on said sixth day of November.

After confirming said sale, said decree proceeds as follows, viz.: "And said Charles P. Redmond as such special commissioner and special master, is hereby directed to convey to said new corporation, under the name of the Little Rock and Fort Smith Railway, and to its successors and assigns, all the lands and property mentioned and described in the aforesaid decree, rendered in this suit on the sixth day of November last past, but that said corporation shall, as a part of the consideration of such conveyance, compromise or pay such claims against the Little Rock and Fort Smith Railroad Company as C. W. Huntington, George Ripley and Henry A. Whitney may, within one year after the date hereof, approve, and in such terms and in such manner as they may prescribe."

This last paragraph is in entire harmony with the powers and agreements under which said purchasing committing were acting, for among said powers was the power "to pay or compromise any claims, either legal or equitable, at their discretion, which may be made upon or on account of said road or other property, or on account of the construction or repairs of the same." (See printed transcript in suit No. 160, page 49, Article 2.)

Inasmuch as the insertion of this paragraph and provision in the decree of confirmation is assigned as one of the causes why the decree should be reversed, the reasons why the same was inserted will be alluded to more particularly hereafter.

The act of incorporation under which the purchasers at said sales organized the new corporation was enacted Dec. 9, 1874. In brief it provided that the purchasers of any railroad at foreclosure sales should, upon the confirmation of such sales, become a corporation, with all the rights, privileges, franchises and immunities of the former corporation, and that such purchasers should organize said new corporation within six months from the date of sale, under such name as they might see fit to adopt, with power on the part of said new corporation to execute mortgages and to issue bonds.

On the twenty-second day of February, 1875, these same appellants, and one Charles H. Richardson, all of said Boston, filed a petition in said land-grant mortgage-foreclosure suit, in which they represented and alleged that they were the holders of a large amount of the bonds issued under said mortgage; that having full confidence in the plaintiffs, trustees under said mortgage, and trusting wholly to them, they did not personally attend said sale nor the hearing upon the confirmation thereof; that the property covered by said mortgage was fully worth, and would have brought at a properly conducted public sale, not less than $500,000; that said trustees, in utter disregard of the interests of the petitioners and other holders of said bonds and their duty as trustees, agreed with the said George O. Shattuck, F. M. Weld and George Ripley to let them purchase all said property for an entirely inadequate compensation, viz., for $50,000, in consideration that the said Shattuck, Weld and Ripley should pay in addition to said sum a certain other large sum of money, not to said trustees for the benefit of all holders of said bonds, including said petitioners, but to certain persons having unsecured claims against said railroad company, and who had no title to share in the proceeds of said property; that pursuant to said agreement the said Shattuck, Weld and Ripley bid at said sale the said agreed sum of $50,000 and the said trustees assented to said sale and consented that the same should be confirmed by this court, and acting in concert with said Shattuck, Weld and Ripley procured to be inserted in the decree of confirmation the condition that as part of the consideration for the conveyance the new corporation formed by said purchasers should compromise and pay such claims against the said railroad company as said Huntington, Ripley and one Henry A. Whitney should approve within one year from the date of such confirmation. Said petition then alleged that the claims against said company which under said conditions may be paid amount to many times the sum bid at said sale, and that said condition is in no respect beneficial, but on the contrary is directly injurious to said petitioners and the other bondholders for whose benefit said sale was made, in that if they become stockholders in said new corporation they will take their property subject to claims the amount of which is wholly uncertain, except that it is limited by the amount of the debts of the said defendant corporation; that the effect of the sale as confirmed with the aforesaid condition is that said petitioner and other holders of said bonds, instead of having a prior lien upon all the property covered by said mortgage, become possessors of the same property subject to all the debts of said defendant corporation to which their claim was formally preferred, while if they elect not to surrender their bonds in exchange for stock in said new corporation, their property is taken from them and the greater part of the proceeds thereof paid to persons who have no legal or equitable claim thereto and their bonds remain almost wholly unpaid.

Said petition also alleges that among the claims so ordered to be paid are claims of the said Atkins and Weld against said railroad company, and that said agreement between said trustees and said purchasers was made with the intent that the claims of said persons should be paid in full out of money justly belonging to said petitioner and the other holders of said bonds, and was therefore a gross breach of the trust accepted by said trustees when they received the appointment and consented to act as such. That said new corporation has been organized, and the said Atkins and Weld elected directors thereof and members of the executive committee of directors, composed of four directors, which is charged with the immediate control and supervision of the affairs of said corporation, so that the interests of said corporation and of said petitioners and other bondholders, should they elect to become stockholders, are without proper representation or protection before the committee appointed to adjudicate such claims as are to be paid by the new corporation, since interested parties control the corporation which should defend against them.

The petitioners pray that the aforesaid decree of confirmation may be modified by striking out the clause thereof which requires the said new corporation to pay, as a part of the consideration for the conveyance of said mortgaged property, the claims against the railroad company therein referred to, and that the time within which the holders of the bonds secured by said mortgage may be entitled to exchange the same for stock in such new corporation may be extended until the decision of the question whether such modification shall be ordered.

The aforesaid Richardson alone made oath to the truth of said petition, and subsequently filed an affidavit stating that he never entered into any agreement with any association of bondholders, or other persons, having in view the purchase of the properties covered by the mortgages of the Little Rock and Fort Smith Railroad Company; that he never gave any power of attorney, or in any way authorized any person to act for him in reference to such purchase; that he never assented, or authorized any person for him to assent, to said decree, or in any way to represent or act for him in the proceedings instituted for the foreclosure of said mortgages, but relied on the trustees to protect his interests as a bondholder.

(*For a copy of said petition see printed transcript in suit No.* 160, *pages* 41 *to* 44.)

The trustees under said mortgage, plaintiffs in said foreclosure suit, filed their answers to said petition of the present appellants, and a hearing was had upon said petition, answers and affidavits of the said Shattuck, Weld and Ripley, at the April term, 1875, by said Circuit Court, before the Honorable the Circuit and District Judges.

The answers of the plaintiff trustees deny that the land grant was worth or would have brought at a properly conducted sale not less than $500,000, and aver that said property was fairly and openly sold by public auction, after proper advertisement by a special commissioner, duly appointed for that purpose by the court; they deny that they made the agreement, alleged in said petition, with the said Shattuck, Weld and Ripley, or any other agreement relating to the purchase of said property; also, that the said Shattuck, Weld and Ripley made any bid at said sale in pursuance of any agreement made with said trustees, and the trustees say that they had no control over said sale and no authority to purchase or sell thereat. The trustees also deny that they in any way disregarded the interests of said petitioner and other holders of said bonds, but on the contrary aver that they used every exertion to promote the interests of the bondholders, and secure the highest price for said property at said sale, and subsequently to secure the most favorable terms for bondholders who might desire to become members of the corporation formed by said purchasers.

The trustees also say that said Shattuck, Weld and Ripley, acting under powers of attorney from a majority of both classes of bondholders, and with authority from other bondholders who did not sign said powers, bought said property for the sum of $50,000, which they paid in cash pursuant to the decree of court, and that before making said purchase they announced publicly that all holders of bonds of either class would be allowed to share in the new organization of the road, if they purchased it, on the same terms as the bondholders represented by them.

Said trustees also averred that prior to said sale, but subsequently to the insolvency of said company, materials had been furnished for constructing about fifty miles of said railroad, and fifty miles of said road had been completed with the consent of the trustees under said mortgages, and of very many of the bondholders, in order to prevent a forfeiture of said land grant, and that large expenditures had been made for the aforesaid purposes by persons who claimed to have equitable liens upon said mortgaged property for such expenditures; that in order to prevent a forfeiture of a further and valuable portion of said land grant, it was necessary to complete about twenty additional miles of said road before May 13, 1875; that in order to prevent objections to said sale on the part of persons holding claims as aforesaid, and secure harmonious co-operation in constructing said road, and to raise funds for the same, it was deemed by said purchasers necessary to recognize the aforesaid claims in the organization of a new corporation to control and manage said road and land grant; that at the request of said trustees, the said purchasers agreed to the insertion in the decrees confirming said sales of a clause authorizing all bondholders to become members of the new corporation by them organized on the same terms with the holders of bonds represented by them; that the total amount of said claims does not exceed four or five per cent of the land grant and first mortgage bonds; that the trustees believed that the price at which said land grant was sold was the largest cash price which could be obtained for the same at said auction, and that the conveyance of said property to a new corporation on the terms set forth in said decree, extinguishing said claims and raising funds to construct said extension, and thus secure said land grant, was calculated to promote the best interests of the bondholders; that after full consideration, and for the reasons above set forth, said trustees assented to said sale and to the decrees of court confirming the same, and said trustees deny that they so assented by reason of any agreement with said purchasers at or prior to said sales.

The trustees in their said answers also aver that all the aforesaid matters were fully stated and explained to the court prior to the confirmation of said sales, and that since said sales one hundred and eighty bondholders, representing bonds to an amount of nearly $8,000,000 out of a possible total of $8,500,000 have, become stockholders and bondholders in said new corporation under the terms of said decrees, and that about twenty miles of road have been constructed by said new corporation at an expense of about $300,000, out of moneys paid in and expended on the faith of said decrees. Said trustees aver that the condition which was inserted in said decree, so far from being injurious to said petitioners and the other holders of said bonds, has been highly beneficial by enabling said new corporation to raise the moneys necessary to extend said road and save said land grant.

They admit that the said Atkins and Weld hold claims which may be referred to the referees mentioned in said decree, and that said Atkins and Weld are members of the Board of Directors and of the Executive Committee of said Board, but they deny that the interests of said petitioners and other holders of said bonds who may become members of said corporation are without protection, and allege that the interests of said petitioners are identical with those of all the other bondholders who have become members of said corporation, and that the said Atkins and Weld were elected such directors with the full knowledge of their said claims and all matters relating thereto on the part of the stockholders, and in the belief that the interests of the said new corporation would be best promoted by their election.

Said trustees also contend in their answers that as matter of law said petitioner cannot maintain his said petition, and pray that they may have the judgment of the court thereon, the same as if they had demurred to said petition.

(*For a copy of the answers of said trustees, see pages* 44 *to* 47 *of the printed transcript in suit No.* 160.)

The affidavit of the said Shattuck, Weld and Ripley states that they attended said sales as the agents of the holders of a majority of said bonds, and annex to their said affidavit a copy of the powers of attorney under which they acted. They also state that they acted for other holders of said bonds; that no agreement whatever was made by them or either of them, with the trustees or either of them, under either of said mortgages, at or prior to the said sales, or in any way relating thereto; that at said sales and prior to purchasing said properties they announced publicly that all holders of said bonds would be allowed to come into any arrangement made for the improvement and management of said properties, should the same be bought by them, upon the same terms with the bondholders whom they represented; that said road and land grant were each sold to them as the highest bidders at said sales for the sum of $50,000 each; that they subsequently organized the Little Rock and Fort Smith Railway after much discussion and negotiation, and that the claims of the different interests were recognized in good faith so as to prevent litigation and to secure the co-operation of all parties in interest in repairing and extending the road and saving the land grant from forfeiture, and that the provisions for the exchange of bonds for stock in the new corporation were as favorable as it was practicable to secure, and at the same time provide funds for the extension of said road.

The result of the hearing upon said petition, answers and affidavits was that the court refused to grant the prayer of said petition or to modify said decree, as prayed, but of its own motion ordered "that said decree be modified and amended by adding to the last clause thereof 'subject to the approval of this court.'" It was further ordered, upon the application of said petitioners, that they and all other holders of said bonds "who have not yet expressed their assent to the action of the trustees and the decree of the court, by complying with the requirements and becoming stockholders in the Little Rock and Fort Smith Railway, have the further time of sixty days from this date in which to elect whether they will become members of said Little Rock and Fort Smith Railway, or will take their proportional share of the moneys in court."

The appellants still declined to become members of the new corporation, and on the sixth day of July, 1875, filed their so-called bills of review in said Circuit Court, joining as defendants the Little Rock and Fort Smith Railway and the trustees under the mortgages executed by the Little Rock and Fort Smith Railroad Company, and foreclosed as above set forth.

The defendants demurred to said bills; the demurrers were sustained, and the bills ordered to be dismissed.

POINTS FOR RESPONDENTS.

I.

Neither of these bills contains any allegations of fraud on the part of the trustees, or any new matter. The appellants appear to assume in certain of their assignments of error that the trustees were guilty of some indefinable kind of fraud in connection with the sales, but no averments of that nature or charges of that character are set forth in the bill.

If the answers of the trustees and the affidavits of the purchasers at said sales, filed at the hearing upon the petition of these appellants for a modification of the decrees of confirmation, and which form a part of the record (see pages 44 to 48 in suit No. 160), do not effectually dispose of any charge or intimation of fraud on the part of the trustees, the appellants are estopped by their brief filed in this court from setting up any such causes for reversing the decrees of confirmation, or for relief of any description. On page 13 of their brief, the learned counsel for the appellants says (the italics are ours): " I have no words of abuse for these trustees. Preferring to let the transaction speak for itself, *I do not even charge them with fraudulent intent. It is probable that they believed they were doing the best possible for their beneficiaries.*"

In the light, therefore, of this disclaimer these bills cannot be regarded either as original bills, in the nature of bills of review to impeach the decrees for fraud, or as supplemental bills, in the nature of bills of review in which new matter is set up as ground for reversing the decrees.

These bills, therefore, must be treated as pure bills of review, and only two principal questions are presented for discussion, viz.: —

First. Do the records disclose such errors in the original proceedings, which resulted in the foreclosure of the mortgages and the confirmation of sales of the properties therein described, as to compel this court either to reverse the decrees of foreclosure and of confirmation of sales, or to place the appellants in the same situation they would have been in had not such decrees been rendered?

Second. Do the appellants sustain such relations to the original foreclosure proceedings as to enable them to maintain these bills of review?

It will perhaps save time and repetition to discuss these questions in the order above given.

II.

The assignments of error as set forth in the bills themselves are numerous, and are for the most part similar in each suit. They resolve themselves, however, into two classes, viz.: —

First. Such errors as are alleged to have been committed in connection with the decrees of foreclosure.

Second. Such errors as are alleged to have been committed in connection with the confirmation of the sales held under said decrees.

We are at a loss to determine from the brief of the learned counsel of the appellants upon what precise assignments of error they rely for a reversal of the decrees, or for other relief.

Two causes of error, common to each suit, are assigned in connection with the decrees of foreclosure.

First. That, as appears by the bills of complaint themselves, the principal of the bonds secured by the mortgages had not become due and payable according to the terms and conditions of said mortgages; that the trustees had no right, power or authority to declare the principal of said bonds to be then due and payable, and the court erred in decreeing payment thereof, and in default of such payment foreclosing said mortgages.

This objection is sufficiently answered by referring to Article 4 of the railroad mortgage (see bottom of page 27 in suit No. 159), and Article 8 of the land-grant mortgage (page 23 in suit No.

160), in both of which articles power is expressly given to the trustees to declare the principal of said bonds due in certain contingencies, and to the allegations in the original bills of complaint in reference to the happening of such contingencies as set forth on pages 16 and 17 in suit No. 159, and page 14 in suit No. 160.

Second. That the bills contain no averment of the amount of interest which was due and unpaid upon said bonds, and that no account was taken before the sale of the exact amount due and payable upon the bonds issued under said mortgages.

The averments in regard to the amount of interest due and unpaid at the time of the filing of the original bills of complaint are as fully and explicitly set forth as the circumstances of the cases admitted and are contained in the fifth paragraph of each of the said bills. (See page 16 in suit No. 159 and page 14 in suit No. 160.)

The decrees rendered on the sixth day of November, 1874, do not undertake to find the exact amount due under said mortgages, and are not to be regarded as final and conclusive upon that point. These decrees, however, are fully sanctioned by this court in

Galveston Railroad Co. *v.* Cowdrey, 11 Wall. 459, 479.

A third cause of error is assigned, solely applicable to the railroad mortgage foreclosure suit in connection with the foreclosure decrees, viz., "that the complainants and many of the defendants were citizens of the same State, and the court had no jurisdiction of the cause."

This objection grows out of the fact that at the time when the petition for the appointment of receivers was filed in October, 1874, in the railroad mortgage foreclosure suit, an amendment was also filed, setting forth more fully than in the original bill the necessity for the appointment of receivers, and making certain holders of the bonds issued under both the land-grant and railroad mortgages parties defendants, and that these bondholders were citizens of the same State as the plaintiffs. It is to be observed that no relief was prayed for as against these new parties, and it is evident from the nature of the amendment itself that these new parties defendant were summoned in simply as the representatives of both classes of bondholders whose interests might be affected by appointing receivers. They were summoned in out of abundant caution, and not because they were necessary parties to the suit or to the aforesaid application.

It is easy to see that in case receivers should be appointed with authority to issue debentures for the completion of the road, questions would arise as to whether such debentures should be a lien upon the road already completed and the lands already patented, either one or both, or, if only upon the road to be completed and the lands to be earned, to what extent and in what manner the said debentures should be a lien upon said road and lands respectively, prior to the lien created by said mortgage deeds. In view of these and other questions which might be suggested, it seemed only proper to have representatives of both classes of bonds, as well as all the trustees under both mortgages represented in court, but the action of the learned District judge, in granting a speedy foreclosure and sale, obviated the necessity of deciding these questions, and rendered the appearance of these new defendants neither necessary nor proper.

It seems absurd to argue that under such circumstances, the court was ousted of the jurisdiction which it had already acquired, or that it was necessary to summon again the defendant corporation to answer to the bill as thus amended. Besides, the records show that the corporation subsequently appeared at the final hearing, Nov. 3.

We do not propose to consider, either in detail or in the order in which they are set forth in the bills, the several causes of error which are assigned in these bills in connection with the decrees confirming the sales held on the tenth day of December, pursuant to the foreclosure decrees.

It will be found more satisfactory to group together such of said assignments of error as rest upon a common foundation, and also to consider them chronologically, or in the order of events to which they relate, from Nov. 6, 1874, the date of the rendition of the decrees of foreclosure and sale.

In this view the first alleged cause of error is the one which is assigned as the ninth in suit No. 159, and the eleventh in suit No. 160, viz., that "a combination was formed among certain classes of bonds to buy the property at a nominal figure, and to thus compel others who were dissatisfied to accept such terms as they might impose, and that such scheme was carried out and effected by a fraudulent and illegal collusion between the purchasers and said trustees."

Inasmuch as the imputations of fraud and collusion on the part of the trustees are abandoned by the appellants in their brief and are disproved by the records, it is unnecessary to pay any attention to that part of the alleged cause of error.

All that the records disclose upon this subject of a combination of bondholders to buy these properties at a nominal figure, and to compel others to submit to such terms as the purchasers might impose, is that at a meeting of the bondholders held in Boston on the twenty-first day of said November, a form of agreement, with powers of attorney looking to purchases of these properties, was adopted for each bondholder of both classes of bonds to execute, and every bondholder of both classes, so far as known, was requested to signify his assent to the plan set forth in said agreement by returning the agreement, with his or their signatures attached, to a given address on or before a certain day. (See pages 48, 49, A, in suit No. 160, for a copy of said agreement) The records also show that the committee named in the aforesaid agreements and powers of attorney attended said foreclosure sales, and, before the bids were opened, publicly announced that all holders of bonds of both classes would be allowed to participate in any arrangement that might be made for the improvement and management of the properties, should such committee become the purchasers, upon the same terms with the bondholders whom the committee specially represented. (See page 47 of record in suit No. 160.)

These sales were conducted by an officer of the court specially appointed as commissioner for that purpose.

The purchasing committee bought the railroad properties for $50,000 cash, and the lands for the same sum.

The imagination fails to conceive how "a *combination* was formed among *certain classes* of bonds," when *all* bondholders, without any discrimination whatever, were not only repeatedly invited before the sales were had to unite in the purchase of these properties, but also after the sales special provisions, looking to that end and adopted for that sole purpose, were inserted in both decrees of confirmation.

It is believed that in the whole history of foreclosure sales under railroad mortgages, no instance can be found in which greater care has been taken and a more earnest desire manifested than in the present instance to remove all antagonism between the different classes of bondholders and to provide that all holders of bonds should, without any discrimination or preference, but equally with all others, participate in whatever benefits might result from the foreclosure proceedings, notwithstanding they had personally made no exertions to that end.

But it is alleged that the court erred in confirming the sales:

First. Because the railroad and lands were each sold for less than their value.

Second. Because the trustees consented to the decrees of confirmation, and they had no right or authority thus to consent.

Third. Because two of the trustees were holders of both classes of bonds, and had executed the aforesaid powers of attorney to the purchasing committee, and that the court erred in confirming a sale from a trustee to himself.

Fourth. Because the two decrees of confirmation were virtually one.

Fifth. Because the court required the railroad bondholders to join with the land-grant bondholders, and *vice versa*, in owning and managing the two properties, or else to take their share of the purchase money.

We have thus grouped together, as we understand them, the assignments of error as set forth in the bill and remaining to be considered.

The objection that these properties were sold for a less price than their real value, even if true, is no cause for reversing the decrees of confirmation and setting aside the sales. The sales were conducted by an officer of the court, specially appointed for that purpose to execute the decrees of the court, and the trustees could exercise no control over the sales. The appellants, in their brief, expressly disclaim all charges of fraud in connection with the sales. Mere inadequacy of price, even when the price is grossly inadequate, does not constitute a sufficient reason to impeach the genuineness or validity of the sale. This doctrine has lately been reiterated by this court in

Clark *et als*. *v*. Commissioners, etc.
Washington Law. Rep. Dec. 8, 1879. Vol. 7, No. 49, p. 549.

See also

Whiting *v*. Bank of the United States, 13 Peters, 6–15.
West *et als*. *v*. Davis, 4 McLean, 241.
Hill on Trustees, 152, note and cases cited.

Whether the prices which were bid and paid for these properties were adequate or not is a question of fact which has already been judicially determined by the Circuit Court, and that question, in the absence of fraud or newly discovered matter, is not open upon a bill of review.

Whiting *v*. Bank of the United States, 13 Pet. 6–15.
Buffington *v*. Harvey, 95 U. S. Rep. 99.

It is to be observed in connection with these sales and the subsequent proceedings, that the trustees were not authorized to bid at said sales, neither were the holders of either classes of bonds authorized to turn in bonds in part payment of the purchase moneys. The terms of sale were cash or its equivalent.

The objection that two of the trustees were holders of both classes of bonds and had executed powers of attorney to the purchasing committee, and that the court erred in confirming a sale from a trustee to himself, may be dismissed with the remark that the trustees had no control over said sales, that a commissioner was specially appointed by the court to execute its own decrees of sale, and the purchasing committee did not buy from the trustees but from an officer of the court.

The doctrine invoked by the appellants, therefore, has no application to the cases now before the court, and even were it true that the trustees became the purchasers at their own sales, such sales would at the most be voidable only, and not absolutely void.

Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587.

All the objections which have been or can be raised to these sales and the decrees of confirmation seem utterly insignificant and frivolous, when the condition of affairs in connection with this road and land grant, as existing at the time of the sales, is regarded.

The sales were openly, fairly and publicly conducted by an officer of the court after advertisements, made under the order of court in the most prominent newspapers published in the principal cities of the United States. The interests of the holders of both classes of bonds evidently demanded that they should become the purchasers at both said sales and that both properties should ultimately be united; for if the holders of the land-grant bonds should alone become interested in its purchase, and their title to the lands not then earned was clear, provided the terms of the grant were complied with, how could they compel the purchasers of the road to comply with those terms by completing twenty miles of new road before the thirteenth day of the next May, and the whole road by July 28, 1876? But could not the purchasers of the road well claim that, inasmuch as their mortgage was prior in point of time and conveyed all the franchises of the corporation, they acquired the right to the remaining lands not then earned and that the land-grant purchasers could only take and hold the lands already patented?

Again: twenty miles of new road were required to be constructed between the nineteenth day of December and the thirteenth day of the following May. The expenses of the foreclosure proceedings were also to be provided for. Certain creditors also claimed to have equitable liens upon these properties, by virtue of having, with the consent and at the request of many holders of both classes of bonds, provided the means necessary to construct and complete the last fifty miles of road then constructed within the time necessary to save the land grant from forfeiture.

What more equitable mode could be devised for providing the funds requisite for the above purposes than by requiring these bondholders, who joined in the purchases, to contribute their proportion, not exceeding a fixed amount, as was stipulated in the agreement under which the purchasing committee acted?

Suppose the trustees had been permitted to become the purchasers at said sales, how could they, without voluntary contributions from the bondholders, raise the funds necessary to pay the purchase moneys, the expenses of foreclosure proceedings, and of completing twenty miles of new road? The mortgages did not contemplate a purchase by the trustees, and no mode was provided by which the bondholders could be assessed for the above purpose.

The only possible way, therefore, by which the necessary moneys could be raised was by some such general plan or scheme as was set forth in the agreements under which the purchases were made.

It is submitted that the trustees performed all their duties to the utmost possible extent when they insisted that the decrees of confirmation should contain clauses permitting all bondholders, within a stated future time, to participate in the benefits of the purchases upon equal terms with all other bondholders.

It is gratifying to them to know that their action in the premises has been approved, not only by the learned District judge, and again upon a rehearing by the distinguished Circuit judge, but also that upwards of $8,000,000 bonds out of a possible aggregate of $8,500,000 have been surrendered and exchanged in conformity with the terms of the decrees, and that these appellants have been unable to persuade any of their fellow bondholders to join with them in their efforts at extortion.

Reorganizations of railroad companies after a foreclosure in which unsecured claims against the old company and even stock have been recognized have been favored by the courts, and bondholders have been excluded who did not comply with the terms of the reorganization.

Smith *v*. Chicago and N. W. R. R. Co., 18 Wis. 17, 23.
Carpenter *v*. Catlin, 44 Barb. 75.
Crawshay *v*. Soutter *et al.*, 6 Wall. 739.
Sage *v*. Central Railroad Co., 99 U. S. 334.

III.

Even though the decrees of foreclosure and confirmation of sales were irregular and void, the title of the purchasers under the decrees cannot, in the absence of fraud, be impeached or invalidated by a reversal of the decrees.

In Bronson *v.* Railroad Company, 2 Black, 524, 530, Davis, J. says, "If the decree was reversed there could be no restitution of the road, its property and franchises, for purchasers at a judicial sale are protected."

In Whiting *v.* Bank of the United States, 13 Peters, 6–9, Story, J. says, "If the sale had been completed under the decree, the title of the purchasers under the decree would not have been overthrown or invalidated, even by a reversal of the decree; and consequently the title of the defendants to the lands would have been extinguished, and their redress upon the reversal would have been of a different sort from that of a restitution of the land sold."

See also Brobst *v.* Brock, 10 Wall. 519, and cases cited, in which Strong J. says, "It is enough that an irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had. For this authority is hardly needed."

IV.

The appellants have no claim whatever to relief of any description. They never became, nor sought to become, parties to either of the original suits, and their interests in those suits were represented by the trustees.

Kerrison, Assignee, *v.* Stewart *et al.*, 93 Otto, 155–160.

They had the right to petition the Circuit Court for leave to intervene in the suits for the protection of their interests, but this they have never done. In connection with one Richardson they did file a petition in suit numbered 160, in which they made certain charges of fraud and collusion against the trustees and purchasers at the foreclosure sales, but the only relief which they sought by that petition was that the decree of confirmation of the sale of the land-grant be modified by striking out the clause requiring the payment of certain claims, and that the time within which the bondholders should elect whether to become stockholders in the new corporation or to take their proportion of the purchase money, be extended until the application for the aforesaid modification of the decree of confirmation was settled.

The modification of the decree was refused, but the court extended the time for the appellants to make their election whether to become members of the new corporation or not.

The petitioners did not then ask to have the decrees of foreclosure or of confirmation set aside, or that they might be placed in the same situation that they would have been in had not such decrees been entered, but they claimed simply that their rights were sacrificed by the aforesaid clause relating to the payment of certain claims. It was against that provision in the decree of confirmation, and that alone, that these appellants sought relief.

As we have before shown, all pretences of fraud or conspiracy on the part of the trustees and purchasers at the foreclosure sales are now withdrawn and abandoned. These bills contain no new matter, but are founded solely and exclusively upon alleged errors apparent on the face of the records in the original suits. The appellants were represented in these suits by the trustees, and inasmuch as the appellants admit in their brief that "it is probable that they" (the trustees) "believed they were doing the best possible for their beneficiaries," the appellants are bound by the acts of their trustees thus done in good faith and approved by the court in which they were litigants.

Kerrison, Assignee, *v.* Stewart, 93 Otto, 155–160.

It is only too apparent that these appellants have been animated throughout this whole litigation solely by the desire to force unreasonable and inequitable concessions from the remaining bondholders, and to acquire superior advantages at the expense of their fellows, when the latter have taken every possible pains and precautions to protect the rights of the appellants.

C. W. HUNTINGTON,
of Counsel.